88-1950

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR DIVISION OF MOTOR VEHICLES,

Petitioners,

vs.

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
ERIC J. TAYLOR
Assistant Attorney General
Counsel of Record
Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether Edleman v. Jordan, 415 U.S. 651 (1974) and Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945), foreclose the holding of the Court of Appeals that the State of Florida waived its Eleventh Amendment immunity simply because it did not raise the Eleventh Amendment until appeal and was represented by the State's Attorney General below? And, whether the Court of Appeals properly added, sua sponte, as a defendant, the Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles, in contravention of the Federal Rules of Civil Procedure, to avoid the Eleventh Amendment bar?

2. Whether the Clean Air Act, 42 U.S.C. §7521, et seq., regulating automobile emissions, preempts state regulation of automobile to the extent that a state may not refuse to provide to the import vehicle owner the state's grant of permission, in the form of a title and registration, to operate the vehicle on the public highways when the imported vehicle owner cannot show the vehicle has been certified by the Environmental Protection Agency as meeting applicable standards and which may not be lawfully operated until such certification has been issued?

3. Whether Respondents had standing to challenge Section 320.02(9), Florida Statutes (1985), prohibiting the issuance of title to and registration of their automobiles when the vehicles could not be lawfully operated under the Clean Air Act and implementing regulations until approval was receieved from the Environmental Protection Agency?

4. Whether the Court of Appeals properly refused to sever the valid provisions of Section 320.02(9), Florida Statutes (1985), from the invalid, thereby striking the entire law and denying the State of Florida the ability to deny title to and registration of vehicles not in compliance with the federal Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq., which the court had found did not preempt state law?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs/Appellees/Respondents:

Myra Holliday Sims

Florida Import and Compliance Association

Defendant/Appellant/Petitioner:

State of Florida, Department of Highway Safety and Motor Vehicles

Charles J. Brantley, Director, Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles [1]

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[1] Mr. Charles Brantley is listed as a party below as he is the Director of Motor Vehicles of the Florida Department of Highway Safety and Motor Vehicles and, thus, the state official the in banc majority added as a party, sua sponte, in their opinion of January 11, 1989. Sims v. State of Florida, Department of Highway Safety and Motor Vehicles, 862 F.2d 1449, 1460 (11th Cir. 1989). Mr Brantley was not a party in the district court nor in any of the proceedings before the Court of Appeals.

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STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR, DIVISION OF MOTOR VEHICLES,

Petitioners,

vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States District Court, Northern District of Florida rendered on December 31, 1985.

2. Opinion of the United States Court of Appeals for the Eleventh Circuit, rendered on December 2, 1987 and reported at 832 F.2d 1558.

3. Order of the United States Court of Appeals for the Eleventh Circuit rendered on March 1, 1988 and reported at 840 F.2d 778, vacating that court's decision of

December 2, 1987.

4. Opinion of the United States Court of Appeals for the Eleventh Circuit, in banc, rendered on January 11, 1989 and reported at 862 F.2d 1449.

Opinion of the United States Court of Appeals for the Eleventh Circuit, in banc, rendered on March 2, 1989, denying Petitioner's Motion for Rehearing in Banc.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit, in banc, was rendered on Junuary 11, 1989. The Department's timely motion for rehearing, in banc, reprinted in the

Appendix, was denied on March 2, 1989. The Court of Appeals' mandate was issued on March 13, 1989 and is reprinted in the Appendix.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the United States Constitution's Supremacy Clause, U.S. Const. art. VI, clause 2; Commerce Clause, U.S. Const. art. I, sec. 8, cl. 3; Art. III and the Eleventh Amendment. The case also involves the Clean Air Act, 42 U.S.C. §7521, et seq., its applicable regulations 19 C.F.R. §12.73 and 40 C.F.R. Part 85, the Motor Vehicle Safety Act, 15 U.S.C. §1397 and §320.02(9), Fla. Stat., (1985). All such Constitutional provisions, statutes and regulations are reprinted in the Appendix.

STATEMENT OF THE CASE

Section 320.02(9), Florida Statutes (1985) requires that all vehicles not manufactured in accordance with the Federal Clean Air Act, 42 U.S.C. §7521 et seq., and the Motor Vehicle Safety Act, 15 U.S.C. §1381 et seq., must be in compliance with the two federal acts before the vehicles can be sold to consumers, titled or registered in Florida. Proof of this compliance is evidenced by a letter from the United States Customs Service (Customs) or letters from the United States Department of Transportation (DOT) and the United States Environmental Protection Agency (EPA),

The Respondent, Florida Import and Compliance Association (FICA) is an unincorporated association of business entities that import foreign vehicles that

do not, at the time of importation, meet federal air pollution and safety standards. The members of FICA are in the business of converting or modifying these non-complying vehicles to meet the federal air and safety standards. Respondent, Myra Holladay Sims (Mrs. Sims), is a citizen and resident of Florida. Petitioner, Florida Department of Highway Safety and Motor Vehicles (Department), is the agency of the State of Florida responsible for the titling and registration of motor vehicles in Florida. Petitioner, Charles J. Brantley, is the Director of the Division of Motor Vehicles of the Florida Department of Highway Safety and Motor Vehicles.

On April 30, 1985, Mrs. Sims purchased a used 1976 Mercedes Benz 450 SEL (Mercedes) from a Ulrich Kiesewalter of Bonn, West Germany. The car was exported from Europe on April 6, 1985 and imported

into the United States at Jacksonville, Florida, on April 30, 1985. The actual sale of the vehicle took place upon its arrival in Jacksonville.

Under federal law, a vehicle not manufactured in accordance with the Clean Air Act, 42 U.S.C. §7521 et seq., or the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq., may not be imported into the United States. See, 42 U.S.C. §7522 and 15 U.S.C. §1397. Customs permits physical presence of vehicles not manufactured in accordance with the two laws into the country for the sole purpose of modification. However, until the two federal laws are fully complied with, the vehicle is not "legally" within the United States for unrestricted use. Because of the two laws and Customs regulations, Mrs. Sims posted a Customs Bond and notified both EPA and DOT's National Highway Traffic

Safety (NHTSA) of her importation of a non-conforming vehicle.

Mrs. Sims received a letter of exemption from EPA on June 3, 1985, stating that her car did not have to be converted or modified as long as she met EPA's stated requirements. Mrs. Sims received this letter because her vehicle fit into one of EPA's exemptions from physical modification.

On June 3, 1985, Mrs. Sims submitted her Safety Act conversion documentation to NHTSA. At that time, however, NHTSA lacked sufficient staff to quickly process the backlog of pending gray market vehicle paperwork. In fact, at the time this lawsuit was instituted, importers were waiting up to nine (9) months after submitting the paperwork to receive proof of compliance.

Mrs. Sims attempted to obtain Florida title and registration documents for her 1976 Mercedes Benz from the State of Florida. However, due to the NHTSA paperwork backlog, she was unable to produce the documents required by Florida law. Therefore, the Department refused to title or register her car until she could produce letters of compliance from both EPA and from NHTSA or Customs.

Respondents' complaint was filed on July 25, 1985. The complaint alleged that Section 320.02(9), Florida Statutes (1985), was unconstitutional because it violated the Supremacy and Commerce Clauses of the United States Constitution. The complaint sought declaratory and injunctive relief.

A final hearing/trial was held by the district court on September 12, 1985, and the court issued its Order and Final Judgment on December 30, 1985, finding that

Section 320.02(9) was unconstitutional as it was preempted by both federal acts. 2/ The case was appealed to the United States Court of Appeals for the Eleventh Circuit. The case was briefed and oral argument heard in September, 1986 on the issue of preemption.

Subsequent to oral argument, the panel, by letter of February 18, 1987, notified the parties that it wished further briefing on a list of questions prepared by the panel. Two of the five questions raised by the panel were whether the Eleventh Amendment barred the action then pending before the court and whether the

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2/ Unbeknown to the Department at the time, Mrs. Sims received her letter of compliance from NHTSA on September 18, 1985, a week after the trial and three months before the district court's decision. This fact did not come to light until September 28, 1986 during oral argument before the panel.

Respondents had standing to challenge the Florida statute. The Department responded by asserting its Eleventh Amendment immunity, and that the Respondents did not possess standing to challenge the Florida law.

The Eleventh Circuit panel, by a decision of 2-1, reversed in part and affirmed in part the final order of the district court and remanded the case for further proceedings consistent with its decision. Its decision was reported at 832

F.2d 1558 (11th Cir. 1987). [3]

On December 21, 1987, the Petitioner filed a Petition for Rehearing and Suggestion for Rehearing In Banc with the court. On March 1, 1988, the Court granted the Appellant's Petition and ordered a rehearing in banc. 840 F.2d 778 (11th Cir. 1988). The case was rebriefed on all the issues raised and decided before the panel.

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[3] While noting that Florida law requires a statute to waive sovereign immunity and that no statute existed waiving the state's immunity in this case, the panel did not directly rule upon the Petitioner's Eleventh Amendment immunity defense. 832 F.2d at 1569-70. Rather, the panel decided to remand the case to the district court to determine if the Respondents should be granted leave to add the appropriate individual official. Id. at 1570. However, the panel denied the Respondents' request to add individual state officials in the appellate case, Id., n. 15, a decision the majority decided not to follow in the in banc opinion.

On January 11, 1989, the Court of Appeals issued its in banc opinion. Sims v. State of Florida, Department of Highway Safety and Motor Vehicles, 862 F.2d 1449 (11th Cir. 1989). The decision found that Section 320.02(9) was not preempted by the Safety Act but was preempted by the Clean Air Act. However, the court struck the entire law without making any attempt to determine if the invalid portion of Section 320.02(9) could be severed from the remaining valid provision and upheld. In addition, the Court of Appeals determined the Eleventh Amendment was waived by the Department for a variety of reasons including that it raised the immunity defense late in the proceedings and and there was a lack of prejudice to the stae officials since the Florida Attorney General had represented the state throughout. Finally, the court ruled that

the Respondents did have standing to challenge the Florida law.

On January 27, 1989, the Petitioner moved for rehearing in banc asking the court to determine whether it was possible to sever the valid provisions of Section 320.02(9). The Court of Appeals denied the motion for rehearing on March 2, 1989.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was based in the United States District Court for the Northern District Of Florida upon federal question juridiction under 28 U.S.C. §1331. The Respondents sought declaratory and injunctive relief under 28 U.S.C. §§2201, 2202.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BARS FEDERAL COURT JURISDICTION IN THIS CASE.

This case was filed by the Respondent against the State and its Department of Highway Safety and Motor Vehicles. No individual state official was ever a named party to the action. The Court of Appeals ruled that the Petitioner waived its immunity under the Eleventh Amendment for the reason that it would be an abuse of discretion if, on remand, the district court should deny a motion to add as a defendant a named official. 862 F.2 at 1460.

The court found this waiver because the Petitioner had not raised the immunity defense at trial or initially on appeal and that the State was not prejudiced by the

lack of a named official because the Florida Attorney General represented the State's interest throughout the case. Id., at 1460 and n. 16. To avoid the Eleventh Amendment bar, the Court of Appeals added Mr. Charles J. Brantley, Director of the Division of Motor Vehicles and announced that the Eleventh Amendment had been satisfied. Id. [4]

The issues raised by the in banc decision are of great importance to the States. Not only does the in banc decision conflict with all decisions of this Court but it also directly conflicts with a

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[4] Subsequent to the immunity defense being raised by the three judge panel, the Respondents moved to add the Director of the Petitioner as a party. The panel denied that motion on May 27, 1987. The Respondents did not move to add the Director before the in banc court. The in banc majority added the Director on their own motion.

decision of the Sixth Circuit Court of Appeals involving nearly identical facts and the same issues.

The decision below is in direct conflict with this Court's decisions on when the Eleventh Amendment immunity defense may be raised and how the immunity defense is to be resolved when it is raised for the first time on appeal. The decision also recognizes an unprecedented form of waiver (no prejudice because a state or one of its agencies is represented by the state's attorney general) and a new remedy to correct the failure to properly name a state official (sua sponte naming the head of the state agency involved). The naming of a state official at the appellate level also runs afoul of the Due Process Clause as the state official is denied any opportunity to be heard. See, 862 F.2d 1469, Tjoflat, J., dissenting.

There is no question that, as a general rule, a state or one of its agencies, cannot be sued in federal court without its consent. Welch v. State Department of Highways, ____ U.S. ____, 107 S.Ct. 2941 (1987); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Dugan v. Rank, 372 U.S. 609 (1963); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). This is a jurisdictional bar which applies regardless of the nature of the relief sought. Papisan v. Allian, 478 U.S. 265 (1986); Pennhurst, 465 U.S., at 100; Cory v. White, 457 U.S. 85 (1982) (injunctive relief). And, important for this case, the Eleventh Amendment may be raised at any time, Edleman v. Jordan, 415 U.S. 651 (1974), including for the first time on appeal. Ford Motor Co., supra.

While a state may consent to suit in federal court, Pennhurst, 465 U.S., at 99; Clark v. Barnard, 108 U.S. 436, 447 (1883), the state's consent must be unequivocal; Pennhurst, 465 U.S., at 99; Edelman v. Jordan, 415 U.S. at 673. A waiver of the state's immunity must be explicitly authorized by the state in its constitution or laws. Palmer v. Ohio, 248 U.S. 32, 43 (1918). Only the state itself may decide when and where to waive its immunity. Pennhurst, 465 U.S., at 99. [5]

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[5] There is an important exception to the general rule. A suit challenging the constitutionality of a state official's actions is not a suit against the state. Pennhurst, 465 U.S., at 102; Ex Parte Young, 209 U.S. 123 (1908). As a state could not enact an unconstitutional law, the official was stripped of his official cloak and was subject to injunctive action. Id. But, the action must be brought against the state official, not the state.

The State of Florida has not waived its Eleventh Amendment immunity. The sovereign immunity of Florida can only be waived by the Florida Legislature. Article X, Section 13, Florida Constitution; Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 734 (11th Cir. 1984); Manatee County v. Town of Longboat Key, 356 So.2d 143, 147 (Fla. 1978). Furthermore, the Eleventh Circuit has ruled in other cases that the Florida Legislature had not legislatively waived the State's immunity in federal court. [6]/ See, Fincher v. State of Florida Department of Labor, 798 F.2d 1371, 1372 (11th Cir. 1986); Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509

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[6]/ Ironically, as stated in footnote 3, infra, these were the same conclusions reached in the panel decision. See, Sims, 832 F.2d at 1569.

(11th Cir. 1986). The Florida Legislature has expressly reserved the State's, and its agencies', Eleventh Amendment immunity. Section 768.28(16), Florida Statutes (1987). The Legislature has not authorized the Florida Attorney General to waive Florida's immunity in any case in which he may appear on behalf of the State or one of its agencies. Therefore, Florida's Eleventh Amendment immunity could not and was not waived by the appearance of the Attorney General defending this action below.

The Court of Appeals ruled that the State waived its Eleventh Amendment immunity because it did not raise the defense at trial or initially upon appeal. Such a ruling negates the holdings of this Court that the Eleventh Amendment "need not be raised in the trial court", Edleman v. Jordan, 415 U.S. at 678, and

that the Eleventh Amendment immunity can even be raised for the first time on appeal, Ford Motor Co., 323 U.S. at 466-467. In both cases, the immunity defense was not raised at trial.

In Ford Motor Co., the State of Indiana did not assert its Eleventh Amendment immunity until the case reached this Court. Ford Motor Company argued that Indiana had thus waived its Eleventh Amendment immunity defense. This Court rejected that argument saying:

> the objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendemnt in this case even though urged for the first time in this Court.

Ford Motor Co., 323 U.S. at 466-67. This Court reaffirmed that holding in Edleman v.

Jordan, supra. There the Illinois officials failed at the district court to raise the immunity defense after being sued. The Court reaffirmed that the Eleventh Amendment defense could be raised for the first time either on appeal before a circuit court or before this Court. Id., 415 U.S. at 677-78.

The decision of the Court of Appeals below is also in direct conflict with a decison of the Sixth Circuit Court of Appeals on the same issue of waiver. In the case of Estate of Ritter v. University of Michigan, 851 F.2d 846 (6th Cir. 1988), the Sixth Circuit was faced with a factual situation nearly identical to that presented here. The University of Michigan Board of Regents was sued in the Michigan Court of Claims. No individual officials of the Board were named in the action. Id., 851 F.2d at 849. The Board removed

the case to federal district court and defended the case on the merits, failing to assert its Eleventh Amendment immunity. Id. The district court granted summary judgment for the Board on the merits and the plaintiff appealed. Id. at 848. The case was briefed and argued on its merits before the appellate court. Id. At oral argument, the Court of Appeals, raised the question of the Board's Eleventh Amendment. Id. Counsel were requested to file supplemental briefs on the issue and the Board's counsel responded by asserting the Eleventh Amendment immunity defense. Id. The plaintiff responded by asserting the Board had waived the immunity defense by removing the case and not raising the immunity defense earlier. Id. The Court of Appeals rejected the plaintiff's arguments. Relying on the decisions of this Court in Ford Motor Co. and Edleman v.

Jordan, it ruled that the Board had not waived its immunity as the Eleventh Amendment defense could be raised at any time. Id. at 851. The court also ruled that a state's appearance and defense on the merits was no bar to the immunity defense. Id. at 852. This case factually is no different than Ritter.

In this case, Court of Appeals also ruled that the Petitioner could not assert the Eleventh Amendment immunity defense, finding that the State and it officials were not prejudiced because the Florida Attorney General represented the Petitioner throughout the proceeding. 7/ Neither this

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7/ The Court of Appeals also stated that the Department did not strongly urge the immunity issue before the in banc court. To the contrary, the Department fully briefed the issue in its briefs to the in banc court and strongly believes in its position.

Court, nor any other court, has ever ruled that "lack of prejudice to the state or its officials" was a proper ground for disregarding the express provisions of the Eleventh Amendment. [8]/

As this ruling is without precedent, this Court's review is imperative because since nearly all states use their attorneys general, or other state employed attorneys, to defend actions against the state and its agencies. If such a ruling were allowed to stand, every time an attorney general appeared, defended on the merits and failed to raise the immunity issue at trial, he would waive it for that state, thereby

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[8]/ Interestingly, the Eleventh Circuit, in an earlier case, rejected the argument that the appearance of the Florida Attorney General, on behalf of Florida, waived the State's immunity. Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d at 734.

negating the holdings of this Court. See, Edleman v. Jordan, 415 U.S. at 677-78. See also, Estate of Ritter v. University of Michigan, 851 F.2d at 852.

The Court of Appeal's attempt to circumvent the Eleventh Amendment by the sua sponte addition of a state official runs counter to the the Federal Rules of Civil Procedure. The action of the Court of Appeals contarvenes Rule 21 on the addition of parties and Rule 43 on the substitution of parties. There is no precedent for the action of the Court of Appeals to correct the failure of the Respondent to name the proper party.

Finally, the decision below denies the state official added by the in banc court, Petitioner Charles J. Brantley, his constitutional right to due process of law. See, 862 F.2d 1469, Tjoflat, J., dissenting. The newly named official would

not be served with the complaint in the case; would not have a right to assert any defenses he may have to the issues in the case; and may likely be saddled with a legal position advanced by the state attorney general that he may disagree with. This lack of basic due process has never been condoned by this Court and has never been a consequence of asserting a state's Eleventh Amendment immunity.

For these many reasons, this Court should take jurisdiction of this case and decide whether a state's Eleventh Amendment immunity is waived when not raised until appeal or where the court finds a "lack of prejudice"; whether the sua sponte addition of an individual at the appellate level is constitutionally permissible and in accordance with federal rules of procedure; and the rights of a state official to due process when he was not a party to the

action in the trial court. The Petitioners request that this Court reverse the judgment of the Court of Appeals and order the case remanded to the district court and dismissed.

II.

THE CLEAN AIR ACT DOES NOT PREEMPT THE STATES' TRADITIONAL REGULATION OF THE HIGHWAYS WHEN A STATE REQUIRES PROOF OF COMPLIANCE WITH THE CLEAN AIR ACT PRIOR TO PERMITTING USE OF THE VEHICLE ON THE PUBLIC HIGHWAYS

The Eleventh Circuit ruled that Section 320.02(9), Florida Statutes (1985), was preempted by the express language in 42 U.S.C. §7543(a) as Congress intended to exclusively regulate emission standards. 862 F.2d at 1455. The Court of Appeals erred, however, in their determination of what "field" Section 320.02(9) regulated. The court inexplicably decided the Florida law was intended to regulate air emission. The Department submits that Section 320.02(9) is a valid police power law regulating the use of automobiles on public highways. Section 320.02(9) does not regulate any air emission standards and, therefore, is not preempted by the

Clean Air Act.

By enacting the Clean Air Act, Congress did not intend to preempt the states' traditional police power of regulating the use of the public highways. Rather than finding express preemption under 42 U.S.C. §7543(a), the Court of Appeals should have determined whether the State's regulation of highways interfered with the federal scheme by using the tests set forth by this Court in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) and Hines v. Davidowitz, 312 U.S. 52 (1941). Had the court applied Section 320.02(9) to the principles of this Court, it would have discovered that the Florida law does not stand as an obstacle to the objectives of Congress or make physical compliance with the federal law an impossibility.

This case appears to be one of first impression before the Court. Because it

effects the relationship between the states and the federal government concerning the states' ability to prevent a violator of federal law from continuing his violation, it is important for all the states.

The federal preemption of state laws has its roots in the Supremacy Clause of the United States Constitution. See, Fidelity Federal Savings and Loan Ass'n v. Cuesta, 458 U.S. 141, 151 (1982). The clause "invalidates state laws that interfere with, or are contrary to federal law." Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S.707, 712 (1985), quoting Gibbons v. Ogden, 9 Wheat. 1, 211 (1824).

The primary task in reviewing a state law to determine if the law is preempted is to "ascertain the intent of Congress." California Federal Savings and Loan Ass'n v. Guerra, ___ U.S. ___, 107 S.Ct 683, 689

(1987). Preemption is not to be lightly presumed. Id., 107 S.Ct. at 689. Because of the effect of preemption, there is a presumption that "state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." Hillsborough County v. Automated Medical Labs, 471 U.S. at 715.

> "Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Jones v. Rath Packing Co., 430 U.S., at 525, 97 S.Ct., at 1309 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S., at 230, 67 S.Ct., at 1152).

Id.

State law may be preempted in any one of three ways, first

> Congress is empowered to preempt state law by so stating in express terms. Jones v. Rath Packing Corp., 430 U.S. 519, 525, 97 S.Ct. 1305,

1309 (1977);

Hillsborough, 471 U.S. at 713. Second,

> In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Preemption of a whole field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Ibid; see Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Id. And finally,

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objections

> of Congress," Hines v. Davidowitz, supra, 312 U.S., at 67, 61 S.Ct., at 404.

Id. See also, Michigan Canners and Freezers Assoc., Inc. v. Agriculture Marketing and Bargaining Board, 467 U.S. 461, 469 (1984).

In determining whether a federal law preempts state law, a court must first consider what "fields" the respective laws regulate. If the fields of regulation are separate and distinct, preemption can be neither express, see, Jones v. Rath Packing Co., supra, nor implied, see, Rice v. Santa Fe Elevator Corp., supra. In a case such as this, where the state and federal laws regulate two entirely different fields, a court can only find preemption if the state law fails either of the tests of Florida Lime or Hines, that is, the state law directly conflicts with the federal law or the state law stands as an obstacle to the

purposes and objectives of Congress.

There are two separate and distinct "fields" of regulation involved in this case. Section 320.02(9) regulates whether certain types of automobiles will be permitted upon Florida's highways. The Clean Air Act regulates air emissions produced by automobiles by setting certain standards for new vehicles. Section 320.02(9) does not create or enforce air emission standards.

Since Section 320.02(9) does not enter into the "field" of regulation of emission standards, there can be no express or implied preemption coming from the Clean Air Act. The determinative question is then whether Section 320.02(9) "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or makes compliance with the Clean Air Act a physical

impossibility. The Petitioner Department asserts that Section 320.02(9), Florida Statutes (1985) does neither.

To make that determination, it must first be decided what was the intent of Congress in enacting the Clean Air Act. California Federal Savings and Loan, 107 S.Ct. at 689. The Department submits the obvious intent of Congress in enacting the Clean Air Act was to prevent the use of any new vehicle which did not meet certain air emission standards. In attempting to improve air quality, Congress set uniform, nationwide standards thus preventing (preempting) local and state governments from enacting or enforcing their own emission standards. prior to the original sale of the vehicle.

While it is thus clear that Congress intended that the states were not to create or enforce their own emission standards, it

by no means follows that Congress intended to prevent (preempt) the states from keeping known violators of the Clean Air Act off the states' roads by refusing to title and register such vehicles. This Court has long held that statutes are not to be interpreted in a manner that would reach an absurd result. See, Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 461 (1892). The courts are to interpret a statute in a way that agrees with the intent of Congress. C.I.R. v. Engle, 464 U.S. 206 (1984). Yet the decision of the Eleventh Circuit ends in such a result that is both absurd and contrary to the intent of Congress in enacting the Clean Air Act.

The Clean Air Act prohibits the importation into the United States, without proper modification, of any vehicle not

manufactured in accordance with the Act. 42 U.S.C. §7422, 19 C.F.R. §12.73(f), and 40 C.F.R. §85.1508. An unmodified, noncomplying vehicle cannot be operated upon the highways of America. 40 C.F.R. §85.1507. Any vehicle not in compliance and inside the customs territory of the United States is here illegally. In fact, anyone who violates these laws and regulations is liable for a civil penalty of up to $10,000 a day. 42 U.S.C. §7524, 40 C.F.R. §1508(b).

States, not the federal government, are responsible for the titling and registration of motor vehicles. States have full powers to regulate the use of the highways and automobiles. Section 320.02(9), Florida Statutes, does not establish or enforce any emission standard. All the statute does is require the owner of a noncomplying vehicle to

submit to the Department proof of his compliance with the Clean Air Act before receiving his registration and, thereby, the state-granted permission to operate his vehicle on the public highways.

What Florida requires is a copy of the documents issued by the United States Environmental Protection Agency and the United States Customs Service, documents the owner is required by EPA to have if he is to be in compliance with the Clean Air Act and to have the vehicle legally in the country.

The Petitioner Department asserts that Congress did not intend that the states be preempted from their traditional role of regulating and protecting the highways of their respective states. Rather, relying upon this Court's holding in Hillsborough County and Pacific Gas & Electric Co. v. Energy Resources Commission, 461 U.S. 190,

206 (1983), the Department submits that Congress had no intent to halt the states' ability to keep noncomplying vehicles off the road.

Under the "tests" of Florida Lime & Avocado Growers and Hines v. Davidowitz, the intent and purpose of the Clean Air Act is enhanced, not diminished or impaired, by Section 320.02(9). The intent of Congress was to allow only those vehicles on the road which met federal standards. This protects air quality. It also protects manufacturers whose vehicles are manufactured in accordance with those standards from state regulations and from noncomplying competitors. Section 320.02(9) offends none of these policies. It does not permit vehicles on the road that would be in violation of the Clean Air Act and it does not impose upon the manufacturers any emission standard at

all. By requiring proof of compliance with the EPA standards only from those vehicles whose manufacturers did not originally build the car to the federal emission standards, Section 320.02(9) enhances the purpose of the Act by keeping off the road the very cars Congress wanted off the road; it does not, under the Hines test, stand as an obstacle to the purpose and objectives of the Clean Air Act.

Furthermore, using the Florida Lime & Avocado test, it is not a physical or legal impossibility to comply with both the federal and Florida laws. Since a vehicle cannot lawfully be in the United States, or operated on the highways, without permission from EPA and Customs, an importer is not harmed by having to wait for his title and registration, the possession of which are necessary to operate a vehicle, until the federal

requirements are first fulfilled.

The untoward result of the decision below is that the states must title and register vehicles that are not legally in the United States and that cannot be legally operated on the public highways, a result which only serves to aid and abet the violation of federal law.

Requiring proof of compliance with the federal law is not inconsistent with the intent of the Clean Air Act or Congress's desire for uniform, nationwide standards, nor will it be a burden upon the manufacturers and importers of vehicles building their vehicles to the federal emission standards. Section 320.02(9) does not impose any additional requirement on the owner of the vehicle. The owner must have these documents prior to legal importation and operation of his vehicle. Requiring their production at the time of

registration is no more burdensome that requiring proof of insurance.

III.

RESPONDENTS LACK STANDING TO CHALLENGE SECTION 320.02(9), FLORIDA STATUTES

In deciding the question of Respondents' standing to challenge Section 320.02(9), Florida Statutes (1985), the decision below seems not to understand that federal laws alone control the importation of vehiclkes into the United States and it is those laws alone that restricted the Respondents' use of their noncomplying vehicles. The Respondents, therefore, had no standing to challenge Section 320.02(9) because they suffered no injury from that law.

The keystone case on standing is Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). As this Court stated in that case, the party bringing an action

must show that:

> 1. The party has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant;
>
> that the injury can be traced to the conduct of the defendant; and
>
> that the injury is likely to be redressed by a favorable decision.

Id. at 472. See also, Regents of the University of California v. Bakke, 438 U.S.

265 (1978). [9]

Here, the Respondents failed to show they have standing. There is no evidence

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[9] In addition to its incorrect conclusion that Respondents met The Valley Forge standing standard, the in banc majority erroneously relied upon Warth v. Seldin, 422 U.S. 490 (1975), to conclude that all the allegations of the complaint must be taken as true. However, in Warth the issue of standing was raised in a motion to dismiss. As noted in City of Hartford v. Town of Glastonburg, 561 F.2d 1032 (2d Cir. 1977):

> If this were an appeal from a judgment granting the defendants' motion to dismiss for lack of standing, we would be required to accept as true all of the material allegations of the complaint. [citing Warth] However, we are reviewing a final judgment based on a fully developed record, and the issue of standing is one on which the plaintiffs bear the burden of proof....

561 F.2d at 1051. In this case, the judgment appealed was final judgment entered after a trial in which Respondents had a full opportunity to establish their standing. Therefore, in this appeal, the Warth reasoning does not apply.

in the record that they suffered any actual injury attributable to Section 320.02(9), or that striking the statute will give them any relief. Indeed, what "injury" they suffer results wholly from federal law.

Both the Clean Air and Safety Acts make it illegal to import, and thus sell or use, a vehicle not complying with the Acts. 15 U.S.C. §1397 and 19 C.F.R. §12.73(f); 42 U.S.C. §7522 and 40 C.F.R. §85.1508.[10] Since importation into the United States is illegal until the Safety and Clean Air Acts are complied with and approval for entry of the vehicle is received from Customs, operation of an unmodified vehicle on the

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[10] None of these statutes or regulations speak to limitations on the titling or registration of motor vehicles. This has traditionally been an area of state control. The Acts only prevent the states from regulating conforming vehicles until after their initial sale.

public highways would violate these laws. 15 U.S.C. §1397; 42 U.S.C. §7522.

Even if Section 320.02(9) did not exist, the Respondents would still not be able, as a matter of federal law, to legally import, offer to sell, sell their vehicles, or operate them on the highways of the United States. This situation exists not just in Florida, but in the other 49 states. Because the Respondents are unable to evade this fact, they have suffered no injury under the Florida law.

Without any legal injury, the Respondents have no standing to challenge the constitutionality of Section 320.02(9), Florida Statutes. The Respondents had no

standing at either the begining of their suit or at the conclusion of the trial. 11/

11/ The Petitioner Department asserted the above argument in support of its assertion that the Respondents had no standing in this case. However, the dissenting judges of the circuit court, while also stating that the Respondents did not possess standing, advanced different grounds for their lack of standing; the case was moot as to Mrs. Sims and FICA did not possess representational injury or injury in fact. See, 863 F.2d at 1463-68, Tjoflat, J., dissenting.

IV.

THE COURT OF APPEALS WAS REQUIRED TO EXAMINE THE SUBJECT STATUTE TO DETERMINE IF THE INVALID PROVISIONS COULD BE SEVERED FROM THE VALID PROVISIONS

In its in banc opinion, the Eleventh Circuit held that Section 320.02(9), Florida Statutes (1985), was, in its entirety, unconstitutional even though it expressly found that the statute was not preempted by the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. 862 F.2d at 1458. Therefore, the Court of Appeals struck the entire law. 12/

12/ By so holding Section 320.02(9), Florida Statutes, totally unconstitutional, the circuit court avoided the commerce clause question. However, Section 320.02(9) is no different than the Texas statute in Direct Automobile Imports Association, Inc. v. Townsley, 804 F.2d 1408 (5th Cir. 1986), that the Fifth Circuit found was not preempted by the Safety Act; not in violation of the Commerce Clause; and, thus, enforceable.

It is axiomatic that a statue, state or federal, is presumed to be valid. National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Corp., 470 U.S. 451 (1985); Clements v. Flashing, 547 U.S. 957 (1982); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Because of this presumption, each statute must be construed to be constitutional if at all possible. J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, ____ U.S. ____, 108 S.Ct. 1392, 1397 (1988); St. Martin Evanglical Luthern Church v. South Dakota, 451 U.S. 772 (1981).

If a portion of the law is found to be unconstitutional, the courts are under an obligation to uphold the law by severing the invalid portions from the valid, thus permitting the valid part to stand. Scheinberg v. Smith, 659 F.2d 476, 481 (5th Cir. 1981), rehearing den'd, 667 F.2d 93

(5th Cir. 1981). To sustain the law, the courts are to subject the terms of the law to a narrowing construction that would preserve the validity of the act. Erzonznik v. City of Jacksonville, 415 U.S. at 216. If a federal court finds that the courts of the state could or would adopt a construction of the statute that eliminates the constitutional defect, then the federal court is to defer to the state and uphold the non-offending provision. See, Time, Inc. v. Hill, 385 U.S. 374 (1967). [13]

The Petitioner Department submits that the Eleventh Circuit failed to follow this Court's and its own decisions on the

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[13] Under Florida law, a court is obliged to adopt a construction of a statute that is constitutional. See, Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1985), answer to certified question conformed to 802 F.2d 1347 (11th Cir. 1985); Industrial Fire & Casulty Insurance Co. v. Kwechin, 447 So.2d 1337 (Fla. 1983).

severability of constitutional aspects of a state statute. Moreover, the Court of Appeals made no attempt to give the law a narrowing construction, even after finding the Section 320.02(9) was not preempted by the Safety Act. This Petitioner submits that the Circuit Court was under an affirmative obligation to review Section 320.02(9) to see if the language requiring evidence of proof of compliance with the Clean Air Act from the EPA could have been severed from the other portions of the law and still have an independently enforceable

law. [14]

It has long been the law of this Court that the federal courts are not to engage in wholesale invalidation of laws. Rather, they are to see if the repugnant provisions

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[14] For example, by striking the offending language of Section 320.02(9) as follows (using overstrikes to remove the invalid provisions),

> Before a motor vehicle which has not been manufactured in accordance with ~~the federal Clean Air Act and~~ the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation ~~and the United States Environmental Protection Agency~~ to be in compliance with these standards.

the Court of Appeals could have examined the law to determine if the remaining provisions were fully independent of the invalid portions thus leaving a fully operative law that could be enforced.

can be separated from the remaining parts. 15/ If part of the challenged law is invalid, the court is to strike the offending portions but uphold the valid parts. Brockett v. Spokane Arcades, Inc., 742 U.S. 491 (1985); Broadwick v. Oklahoma, 413 U.S. 601 (1973); Bank of Hamilton v. Dudley's Lessee, 27 U.S. (Pet.) 492 (1829) (the bad parts of a law may be disregarded

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15/ "Whenever an act of Congress contains unobjectional provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the act in so far as it is valid." El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909).

giving full effect to the non-repugnant).

16/ As this Court said in Brockett:

> the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected

Id., 472 U.S. at 502, quoting Allen v. Louisiana, 103 U.S. 80, 83-84 (1881). 17/ This Court reached that same result in

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16/ In Florida, a court is to examine a challenged law and, if possible, sever the invalid portions from the remainder of the law. Eastern Air Lines v. Department of Revenue, 455 So.2d 317 (Fla. 1984); State v. Champe, 373 So.2d 874 (Fla. 1978).

17/ For examples of cases in which the remainder of a statute was upheld while part of the statute was declared invalid, see, Buckley v. Valeo, 424 U.S. 1 (1976); U.S. v. Jackson, 390 U.S. 570 (1968); and El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87 (1909).

Regan v. Time, Inc., 468 U.S. 641 (1984) (plurality opinion). [18]

This Court has held that the constitutional provisions of a law are presumed to be severable if what remains after the severence is fully operative as a law. Alaska Airlines, Inc. v. Brock, U.S. ____, 107 S.Ct. 1476, 1479-80 (1987); I.N.S. v. Chadha, 462 U.S. 919, 934 (1983); U.S. v. Jackson, 390 U.S. 570 (1968). This holding arises from the basic principle of the presumption in favor of severability, reasoning that severence is preferable to striking an entire act. Regan, 468 U.S. at

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[18] Judge Fay of the Eleventh Circuit Court of Appeals, writing separately, in President's Commission On Organized Crime v. Scaduto, 763 F.2d 1191 (11th Cir 1985), cited this Court's decision of Regan for the general proposition of severability and then stated "[i]f the unconstitutional portion of a statute can be severed, the remaining portion should be upheld". Id., 763 F.2d at 1201.

653.

The test of severability is that restated by the Court in Alaska Airlines. If dropping the invalid part will leave a fully operative law, then the invalid part is to be discarded and the remainder of the law can be enforced. Id., 107 S.Ct. at 1480. Furthermore,

> [u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Buckley v. Valeo, 424 U.S. 1, 108 (1968), quoting Champlin Refining Co. v. Corporation Commission of Oklahoma, 286

U.S. 210, 234 (1932). [19] To not have severability, the parts of the law, constitutional and unconstitutional, must be mutually dependent upon one another so that one part will not stand without the other. See, Carter v. Carter Coal Co., 298 U.S. 38 (1936). [20]

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[19] A statute is not required to have a severability clause in order for the court to sever the valid from the invalid. The absence of a severability clause does not reaise the presumption against severability. Alaska Airlines, Inc. v. Brock, 107 S.Ct. at 1481. See also, Tilton v. Richardson, 403 U.S. 672, 684 (1971) (plurality decision).

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[20] Florida's holdings on the tests for severability mirror those of this Court. See, Eastern Air Lines v. Department of Revenue, supra; State v. Lee, 356 So.2d 276, 283 (Fla. 1978); Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962).

Petitioner Department asserts the Eleventh Circuit failed to follow the clear decisions of this Court by not even attempting to determine if the expressly constitutional portion of Section 320.02(9), Florida Stautes, could have stood independently and severed from the invalid portions of that statute. If the Court of Appeals had lined out those words in Section 320.02(9) that were preempted by the Clean Air Act, as was done in footnote 14 of this Petition, the court could have tested the remaining language to determine if a whole, rational statute remained. The Department further asserts that had the proper analysis had been done below, the circuit court would have discovered the remaining valid portions of Section 320.02(9) would be an enforceable law as the court had just ruled that a state was not preempted from requiring proof of

compliance with the Safety Act.

This failure to attempt to determine if severence was possible put the Eleventh Circuit into direct conflict with the Fifth Circuit Court of Appeal in Direct Automobile Imports Association, Inc. v. Townsley, 804 F.2d 1408 (5th Cir. 1986). In that case the Fifth Circuit had before it a Texas statute nearly identical to Section 320.02(9) (a fact never disputed by the Respondent or the Eleventh Circuit itself. See, 862 F.2d at 1456). After reaching the same conclusions later reached by the Eleventh Circuit on the merits of the preemption question, the Fifth Circuit, determined that the valid portion of the Texas statute could stand alone. The Fifth Circuit then lifted the district court's injunction against the enforcement of the Safety Act provisions of the Texas statute.

The same result was reached in Georgia Automobile Importers Compliance Association v. Bowers, 639 F.Supp. 352 (N.D. Ga. 1986). 20/

20/ Another result of not attempting to determine whether the valid portions of Section 320.02(9) could stand independent of the invalid portions, was the Eleventh Circuit declining to address the Commerce Clause issue ruled upon by the district court and the panel decision. This too put that court in direct conflict with the Fifth Circuit Court of Appeal in Direct Automobile Imports Association, Inc. v. Townsley, supra. After determining that the valid portion of the Texas statute could stand alone, the Fifth Circuit examined whether the remaining provision was in conflict with the Commerce Clause. The court thought the Commerce Clause argument so weak it held the issue was without merit, 804 F.2d at 1416, permitting enforcement of the valid provisions of the Texas law. The same result was reached in Georgia Automobile Importers Compliance Association v. Bowers, 639 F.Supp. at 362-63.

CONCLUSION

The Petitioners submit that summary disposition of this case on the Eleventh Amendment would be appropriate, in which case the Court should grant certiorari and reverse the judgment below. In the alternative, the Court should grant certiorari and permit full briefing of the issues.

Dated: May _____, 1989.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
ERIC J. TAYLOR
Assistant Attorney General
Counsel of Record
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
(904) 487-2142
Counsel for Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 86-3055

MYRA HOLLADAY SIMS and FLORIDA
IMPORT AND COMPLIANCE ASSOCIATION,
Plaintiffs/Cross-Appellees,

vs.

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY AND MOTOR VEHICLES,
Defendant/Cross-Appellant.

[January 11, 1989]

Appeal from the United States District
Court for the Northern District of Florida

Before Roney, Chief Judge,
TJOFLAT, HILL, FAY, VANCE,
DRAVITCH, JOHNSON, HATCHETT,
ANDERSON, EDMONDSON and COX,
Circuit Judges.

HATCHETT, Circuit Judge:

We took this case in banc to determine whether Florida Statute 320.02(9) violates the Supremacy Clause and the Commerce

Clause of the United States Constitution. Finding the statute unconstitutional, we affirm in part and reverse in part.[1]

FACTS

On April 30, 1985, Myra Holladay Sims imported from Europe an automobile popularly known as a "gray market" automobile.[2] Gray market automobiles are imported automobiles which do not comply with United States emissions and safety standards. The Florida Import and Compliance Association (FICA) is a trade association whose members directly participate in importing and altering gray

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[1] By our rules, we vacated the panel opinion, 832 F.2d 1558, at 840 F.2d 778 (11th Cir.1988).

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[2] Sims purchased the used 1976 Mercedes Benz 450 SEL from Ulrich Kieserwalter of Bonn, West Germany.

market automobiles.

Two federal statutes govern the importation of foreign manufactured automobiles into the United States. The Clean Air Act (42 U.S.C. § 7522), and the Safety Act (15 U.S.C. § 1397), bar the importation of motor vehicles which do not comply with the applicable federal emissions and safety standards. Specifically, the Clean Air Act prohibits

> the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations

prescribed [by this statute][3]

42 U.S.C § 7522(a)(1). Also, section

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[3] The Clean Air Act does not define "new car" as it relates to gray market automobiles by considering whether the automobile has previously been sold prior to its importation into the United States:

> (3) Except with respect to vehicles or engines imported or offered for importation, the term 'new motor vehicle' means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term 'new motor vehicle engine' means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser, and with respect to imported vehicles or engines, such terms mean a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine) had it been manufactured for importation into the United States).

42 U.S.C. § 7550(3) (emphasis added).

7522(b)(2) provides:

> [t]he Secretary of the Treasurey and the Administrator [of the Environmental Protection Agency (EPA) may, by joint regulation provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to ensure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate customer, of a new motor vehicle or new motor vehicle engine that fails to comply with applicable standards

> of the Administrator under this part.

Similarly, the Safety Act provides that "[n]o person shall manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehcile [unless it is in conformity with applicable federal motor vehicle safety standards]." 15 U.S.C. § 1397(a)(1)(A). In addition, that statute provides:

> [T]he Secretary of the Treasury and the Secretary [of the National Highway Safety Administration, Department of Transportation (DOT)] may, by . . . regulations, provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to ensure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable federal motor vehicle safety standard prescribed under this subchapter, or will be

exported or abandoned to the United States.

15 U.S.C. § 1397(b)(3).

Despite general prohibitions against importing nonconfroming motor vehicles into the United States, Congress, under the above provisions, authorized the importation of gray market vehicles upon the furnishing of a bond or other means of assuring that the importers and their customers do not circumvent the federal environmental safety laws. The EPA, the DOT, and the Treasurey Department promulgated regulations governing such importation. See generally 19 C.F.R. §§ 12.73, 12.80; 40 C.F.R. Part 85, Subpart P and 49 C.F.R. Part 571. Under these regulations, the authorities conditionally admit gray market vehicles into the United States for the limited purpose of enabling the importer to comply with federal

emissions and safety laws. The importer must post an entry bond with the United States Customs Service (Customs) for an amount equal to the value of the vehicle plus the customs duty. See Automobile Importers Compliance Association, Handbook of Vehicle Importation, 21 (1984). In addition, the importer must sign a statement indicating that the motor vehicle "is not covered by a certificate of conformity with federal motor vehicle emission standards but will be brought into conformity with such standards." 19 C.F.R. § 12.73(b)(5)(x) (1986). Finally, the importer must declare that the vehicle "was not manufactured in conformity [with] all applicable safety standards, but it has been or will be brought into conformity."

19 C.F.R. § 12.80(b)(1)(iii).[4] The entry

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[4] Title 19 C.F.R. § 12.80(b)(1)(iii) reads:

> (b) Requirements for entry and release.
>
> (1) [E]ach vehicle . . . offered for introduction into the customs territory of the United States shall be denied entry unless the importer or consignee files with the entry a declaration, in duplicate, which declares or affirms one of the following:
>
> . . . .
>
> (iii) The vehicle or equipment item was not manufactured in conformity [with] all applicable safety standards, but it has been or will be brought into conformity. Within 120 days after entry, or within a period not to exceed 180 days after entry, if additional time is granted by the Administration, National Highway Traffic Safety Administration ("Administrator, NHTSA"), the importer or consignee will submit a true and complete statement to the Administrator, NHTSA, identifying the manufacturer, contractor, or other person who has brought the vehicle or equipment item into conformity, describing the exact nature and extent of the work performed, and certifying that the vehicle or equipment item has been

bond assists in enforcing the importer's obligation to comply with federal emission requirements and safety standards because Customs will not release the bond until it receives assurance from the EPA and DOT that the importer has complied with the standards. See 19 C.F.R. §§ 12.73c and 12.80e.

When Sims's automobile arrived in Jacksonville, Florida, she complied with the applicable federal regulations governing the importation of gray market

brought into conformity, and that

(footnote con't)

> the vehicle or equipment item will not be sold or offered for sale until the Administrator, NHTSA, issues an approval letter to the district director stating that the vehicle or equipment item described in the declaration has been brought into conformity with all applicatable safety standards.

19 C.F.R. § 12.80(b)(1)(iii).

vehicles, which included posting a bond in the requisite amount. The EPA exempted Sims from conforming her vehicle to the applicable federal emission standards and sent her a letter releasing the EPA obligation on the bond.[5] In complying with the Safety Act and the DOT regulations, Sims completed the requirements under 19 C.F.R. § 12.-80(b)(1)(iii).

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[5] The importer of a vehicle, more than five years old and imported for personal use and not for resale, is entitled to a once-in-a-lifetime exemption from the Clean Air Act's emission standards. The EPA automatically grants the exemption but the importer is still required to comply with the requirements of the Safety Act and the DOT. In addition, the laws prohibit the importer from selling the vehicle for two years after importation. See generally United States EPA, Automotive Imports-Fact Sheet 76 (1983).

In 1984, the Florida legislature passed the following statute concerning motor vehicle titling and registration:

> Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. A vehicle which is registered pursuant to this subsection shall not be titled as a new motor vehicle.

Act approved June 11, 1984, ch. 84-155, § 3, 1984 Fla. Laws 457, 458 (codified as amended at Fla.Stat. § 320.02(9) (1985)). This provision prevents a gray market vehicle owner from acquiring title and vehicle registration in Florida until the owner has obtained the required documentation from the federal government.

Subsequent to the passage of Fla.Stat. § 320.02(9), Sims unsuccessfully sought to title and register her automobile at the Florida Department of Highway Safety and Motor Vehicles (DMV). The DMV refused to title and register Sims's vehicle because she did not produce release letters from the DOT and Customs certifying compliance with federal standards. Sims had not received a bond release letter from the DOT because the DOT had an excessive number of forms for review.[6]

PROCEDURAL HISTORY

Following refusal to title and register the vehicle, Sims and the FICA filed suit in United States District Court for the Northern District of Florida alleging that

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[6] In July, 1985, the DOT had 14,000 compliance forms for review.

the state's enforcement of section 320.02(9) violated the Supremacy and Commerce clauses of the United States Constitution: (1) the Clean Air Act and Safety Act preempt the state's authority to require compliance with federal emission and safety standards, and (2) enforcement of section 320.02(9) impermissibly burdens foreign and interstate commerce. The district court concluded that the Clean Air Act and Safety Act preempt the state's authority to enforce section 320.02(9) and that enforcement of the statute would violate the commerce clause. The district court declared section 320.02(9) unconstitutional and enjoined its enforcement. The state brings this appeal from the district court's ruling.

DISCUSSION

We first discuss those issues the parties presented to the district court, upon which the district court ruled, and the State of Florida initially appealed: the constitutionality of Florida Statute 320.02(9) under the Supremacy and Commerce clauses of the United States Constitution.[7]

1. Supremacy Clause

Sims and FICA successfully challenged the constitutionality of Fla.Stat. § 320.02(9) in the district court. The district court held that the Clean Air Act and the Safety Act preempt the state's

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[7] The parties did not present the jurisdictional issues which we later address to the district court, but the panel (Judges Tjoflat, Hatchett, and Eaton) raised them at oral argument. The parties briefed and argued these jurisdictional issues before the in banc court.

authority to require compliance with federal emission and safety standards. Federal preemption of state law is derived from the Supremacy clause of article VI, clause 2, of the United States Constitution, which reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Supreme Court stated the three ways in which federal law may preempt state law:

> Federal law may preempt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. [Citation omitted.] Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the states must leave all regulatory activity in that area to the

> federal government. [Citations omitted.] Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law.

Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984).

We acknowledge[d] the well established principle that the touchstone of preemption analysis is congressional intent . . . ." Howard v. Uniroyal, Inc. 719 F.2d 1552, 1555 (11th Cir.1983) Additionally, we have noted that "[t]he intent of Congress to preempt a state law may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in it structure and purpose.'" Howard, 719 F.2d at 1556 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, 97

S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

A. The Clean Air Act

The Clean Air Act contains the following preemptive provision regarding state enforcement of federal emission standards:

> No state or any political subdivision thereof shall adopt of attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to [the vehicle emission standards of the Clear Air Act]. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a). The express language in section 7543(a) indicates Congress's intent to exclusively regulate the control of new motor vehicle emissions prior to

their initial sale. See Michigan Canners, 467 U.S. 461, 1094 S.Ct. 2518, 81 L.Ed.2d 399.

The state contends that Fla.Stat. § 320.02(9) simply ensures that new motor vehicles coming onto Florida's highways comply with the Clean Air Act; it does not establish new or conflicting emission standards. Although the state may base its contention on proper and wholesome intentions, nevertheless, Congress specifically stated that "[n]o state . . . shall adopt or attempt to enforce any [federal or state] standard relating to the control of emissions from new motor vehicles" prior to the initial sale. 42 U.S.C. § 7543(a) (emphasis added). Thus, we agree with the district court's ruling and hold that "[e]nforcement of the Clean Air Act before [the] first sale [of new motor vehicles] is the sole and exclusive

perogative of the federal government."[8]

B. The Safety Act

Safety Act likewise contains a preemptive provision which reads in part:

> Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no state or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal

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[8] The district court additionally noted that section 7543(d) of the Clean Air Act further indicates Congress's intent to exclusively enforce federal emission standards relating to new automobiles before their initial sale because the statute specifically allows the state to regulate automobile use and operation subsequent to the initial sale. Title 42 U.S.C. § 7543(d) reads: "Nothing in this part shall preclude or deny to any state or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." [Emphasis added.]

standard.

15 U.S.C. § 1392(d). Unlike the preemptive provision contained in the Clean Air Act, this section precludes states from enforcement of safety standards only when such standards differ from federal standards.

The district court held that prior to a motor vehicle's first sale, "[t]he states are absolutely barred from acting in any manner whatsoever in" enforcing federal safety standards and that "the role of the states in enforcing the federal laws and regulations is confined solely to the period after the first sale of an automobile." We disagree with the district court.

The Safety Act does not expressly preclude states from requiring proof of compliance with federal safety standards before obtaining title and registration for

gray market automobiles. The United States Supreme Court stated that "[t]he question whether the regulation of an entire field has been reserved by the federal government is, essentially, a question of ascertaining the intent underlying the federal scheme." Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 714, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 722 (1985). Congress enacted the Motor Vehicle Safety Act to establish uniform federal safety standards. See H.R. 1776, 89th Cong., 2d Sess. 17 (1966). The Safety Act as orginally enacted, restricted federal enforcement of safety standards to the initial sale of new vehicles and permitted state enforcement of safety standards identical to corresponding federal standards after the first sale of new vehicles. S.Rep. No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S.Code Cong.

& Admin.News 2709, 2720.

Also, the District Court for the Middle District of Pennsylvania held that the federal laws preempted state safety standards identical to federal standards because congress intended to preclude states from presale enforcement offederal safety standards. Truck Safety Equipment Institute v. Kane, 466 F.Supp. 1242 (M.D.Pa.1979). The court in Kane, however, noted that the standards derived under the Pennsylvania system required independent testing and the payment of fees to cover the cost of such testing. Kane, 455 F.Supp. at 1245-46. Unlike the Pennsylvania regulations examined in Kane, section 320.02(9) does not impose requirements on a gray market vehicle importer beyond those imposed by the applicable federal standards.

In 1982, the National Highway Traffic

Safety Administration (NHTSA) issued an opinion interpreting the extent to which the Safety Act preempted state enforcement of federal safety standards. Federal Motor Vehicle Safety Standards: Interpretation Regarding Preemption and Presale State Enforcement of Safety Standards, 47 Fed.Reg. 884 (Advisory Letter) (1982). In its interpretation, the NHTSA stated:

> [I]t is the position of the NHTSA that any state requirement which necessitates that manufacturers pay fees in order to obtain approval under a state standard identical to an FMVSS [Federal Motor Vehicle Safety Standard], and any imposition of requirements for approval which has the effect of prescribing the sale of equipment certified under the Act to a standard such as FMVSS 218 would be preeempted by operation of the Act and of the agency's action in adopting the federal standard in question.

47 Fed. Reg. at 885.

Recently, the Fifth Circuit examined a Texas statute similar in language to

Fla.Stat. § 320.02(9) and stated:[9]

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[9] Texas statute, H.B. 1805 provides:

> Before a motor vehicle not manufactured for sale or distribution in the United States may be registered and titled in Texas, the applicant shall furnish to the designated agent: (1) a bond release letter, with all attachments, issued by the United States Department of Transportation acknowledging receipt of a statement of compliance submitted by the importer of the vehicle and that the statement meets the safety requiremtns of 19 C.F.R. 12.80(e); and (2) a bond release letter, with all attachments, issued by the United States Environmental Protection Agency stating that the vehicle has been tested and shown to be in conformity with federal emission requirements; and (3) a receipt of certificate issued by the United States Department of Treasury showing that any and all gas guzzler taxes due on the vehicle under the provisions of Pub.L. No. 95-618, Title II, Section 201(a) (16 U.S.C.A. 4064) have been fully paid; or (4) proof satisfactory to the agent that the vehicle was not brought into the United States from outside the country. [Emphasis added.]

> H.B. 1805 places no burden on the manufacturer, which was clearly the concern behind the interpretation. H.B. 1805 does not involve the payment of any fees, nor does it have the effect of prescribing the sale of federally certified equipment. Indeed, H.B. 1805 does not require any certification except federal certification by federal authorities. As best we can tell, the original pre-1982 amendment provision was enacted to assure uniformity of standards for manufacturers so vehicles and equipment meeting the federal standards could be sold freely in any state. See remarks of Senator Magnuson (one of the NHTSA's sponsors), 112 Cong.Rec. S14230 (daily ed. June 14, 1966) (remarks of Senator Magnuson). The Texas statute. H.B. 1805, does not impair this objective since it creates no independent state standard or certification of the automobiles.

Direct Automobile Imports Association, Inc. v. Townsley, 804 F.2d 1408, 1414 (5th Cir.1986). The same rationale applies to Fla. Stat. § 320.02(9). Section 320.02(9) does not impose additional requirements or

burdens on the manufacturer or importer, nor does it require the payment of additional fees. Further, section 320.02(9) does not prescribe the sale of federally certified equipment or impair Congress's objective of establishing uniform federal safety standards to permit the free marketability of vehicles in all states.

In 1982, Congress added the following sentence to section 1392(d): "Nothing in this section shall be construed as preventing any state from enforcing any safety standard which is identical to a federal safety standard." 15 U.S.C. § 1392(d) (1982). The Senate issued a report on the amendment which reads in part:

> states are not preempted from enforcing safety standards identical to federal standards which they have adopted. States may not require [state] certification or approval of motor

> vehicles or motor vehicle equipment. However, state enforcement may be carried out according to applicable state laws. States may undertake independent testing, and also may require manufacturers to submit adequate test data concurrent with the first sale or thereafter. [Emphasis added.]

S. Rep. No. 505, 97th Cong., 2d Sess. 6, reprinted in 1982 U.S. Code Cong. & Admin. News 3169, 3174.

The District Court for the Northern District of Georgia addressed the constitutionality of Georgia statutes O.C.G.A. §§ 40-2-25.1[10],

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[10] Section 40-2-25.1 provides that:

> (a) No application shall be accepted and no certificate of registration shall be issued to any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by
> . . . the 'Clean Air Act,' . . . and as required by . . . the 'National Traffic and Motor Safety Act,' . . . unless and until the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency have certified that the motor vehicle complies with such applicable federal standards and unless all documents required by the Department of Revenue for processing an application for a certificate of registration or title are printed and filled out in the English language or are accompanied by an English translation.

O.C.G.A. § 40-2-25.1(a) (1985).

40-3-29.1[11], and

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[11] Section 40-3-29.1 states that:

> [N]o application shall be accepted and no certificate of title shall be issued to any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by . . . the 'Clean Air Act' . . . and as required by the 'National Traffic and Motor Safety Act,' . . . and as required by the 'National Traffic and Motor Safety Act,' . . . unless and until the United States customs Service or the United States Department of Transportation and the United States Environmental Protection Agency have certified that the motor vehicle complies with such applicable federal standards and unless all documents required by the Department of Revenue for processing an application for a certificate of registration or title are printed and filled out in the English Language or are accompanied by an English translation.

O.C.G.A. § 40-3-29.1 (1985).

16-9-110[12] (1985) in light of 15 U.S.C. § 1392(d) (1982). Georgia Automobile Importers Compliance Association, Inc. v. Bowers, 639 F.Supp. 352 (N.D.Ga.1986). In reviewing the legislative history of section 1392(d), the district court noted several statements made on the floor of the House of Representatives on the bill's

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[12] Section 16-9-110 provides that:

> (a) It shall be unlawful for any person, firm, or corporation knowingly to sell, transfer, or otherwise convey any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by . . . the 'Clean Air Act,' . . . and the 'National Traffic and Motor Safety Act,' . . . unless and until the United States Customs Service of the United States Department of Transportation and the United States Environmental Protection Agency have certified that the motor vehicle complies with such applicable federal standards.

O.C.G.A. § 16-9-110(a) (Supp.1985).

passage which indicated congressional intent. Representative Wirth stated that "[a] recent court case and NHTSA opinion have changed the scope of traditional state enforcement." 128 Cong. Rec. H3438 (daily ed. June 14, 1982) (remarks of Rep. Wirth). Representative Moorhead considered the amendment to affirmatively declare states as having a role in enforcing federal safety standards. See 128 Cong. Rec. H3439 (daily ed. June 14, 1982) (remarks of Rep. Moorhead). In addition, Representative Dingell stated that under the amended section 1392(d) "states may undertake independent testing of vehicles or equipment and may require manufacturers to submit adequate data concurrently with the first sale within a state, or thereafter." 128 Cong. Rec. H3440 (daily ed. June 14, 1982) (remarks of Rep. Dingell).

We agree with the Fifth Circuit's conclusion in Townsley that the "the legislative history shows an intent to preempt state presale enforcement of federal standards where the sale of federally certified equipment is impaired by an independent state compliance system." Townsley, 804 F.2d at 1415. Fla.Stat. § 320.02(9) does not impair the enforcement of federal safety standards or frustrate Congress's intent of establishing uniform standards for vehicle manufacturers; consequently, we hold that the Safety Act, as amended, does not preempt Fla.Stat. § 320.02(9) (1985).

II. Commerce Clause

Although we hold that the Safety Act does not preempt the Florida Statute, we earlier held that the federal government solely and exclusively may enforce the

Clean Air Act before a vehicle's first sale. Consequently, the Clean Air Act preempts Florida Statute 320.02(9), rendering this Florida statute unconstitutional. In light of this holding on the preemption issue, we need not decide the statute's consitutionality under the Commerce Clause.[13]

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[13] The commerce clause of the United States Constitution reads in part as follows: "The Congress shall have the power to regulate commerce with foregin nations, and among the several states . . . ." U.S.Const. art. 1, § 8, cl. 3. To determine whether Fla.Stat. § 320.02(9) is vilative of the commerce clause, we would be called upon to (1) determine exactly what interest the Florida statute purports to protect, (2) determine whether the statute burdens commerce, and if so, to what extent, and (3) balance the weight and nature of the interests protected by the statute against the extent to which it imposes a burden on commerce. See generally Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981). Nothing would be gained by applying the balancing tests required for commerce clause review on an unconstitutional statute.

III. Jurisdictional Issues

We now turn to the jurisdictional issues of standing, mootness, and soverign immunity.[14]

A. Standing

The state of Florida contends that Sims and the FICA lack standing to challenge the constitutionality of Fla.Stat. § 320.02(9) because they failed to show (1) a judicially cognizable injury traceable to the statute's enforcement, and (2) a likelihood of redress if we declare the statute unconstitutional. "[T]he question of standing is whether the

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[14] The parties did not present these issues to the district court. The panel could have immediately remanded the case to the district court directing it to consider these issues after presentations by the parties. The panel required supplemental briefs and ruled on the issues without remand.

litigrant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). To satisfy the standing requirement, a plaintiff must allege a personal injury fairly traceable to the challenged conduct and a likelihood that the requested relief will redress such injury. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

The Supreme Court requires the courts to "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." Warth, 422 U.S. at 401, 95 S.Ct. at 2206; see Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60

L.Ed.2d 66 (1979). In satisfying the initial article III standing requirement--an allegation of "a distinct and palpable injury." Sims and the FICA allege that the state's enforcement of section 320.02(9) unlawfully prevents titling and registering gray market vehicles in Florida. See Warth, 422 U.S. at 501, 95 S.Ct. at 2206. Assuming, as we must, the truth of these allegations, the state's unlawful refusal to issue titles and registrations to owners of gray market vehicles constitutes a distinct and palpable personal injury to Sims and the FICA.

Sims and the FICA make additional assertions sufficient to establish the second standing requirement--the requested relief's likelihood of redress. Absent section 320.02(9), Florida would title and register Sim's and other owners gray market vehicles.

The state's standing contention has no merit. We must determine standing at the time a plaintiff files suit. Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 332, 100 S.Ct. 1166, 1170, 63 L.Ed.2d 427, 435 (1980). At the time Sims filed this lawsuit, Sims owned the vehicle that Florida refused to title. The state relied on the statute for its refusal. Who suffers a greater injury than the owner to whom the state denies title and registration? Likewise, Sims prayed that the district court declare the statute unconstitutional and enjoin its future enforcement. The district court provided this relief.

As to the FICA's standing, we must determine its members's involvement in importing and marketing gray makret automobiles. According to the complaint,

FICA members include

> persons and Florida business entities who support improving opportunities for commerce with foreign nations in the importation, use and sale in the United States of foreign-manufactured automobiles that are converted in his country to comply with emission and safety standards of the clean Air Act and Vehicle Safety act. Plaintiff FICA's members include importers of automobiles for their personal use as well as importers for sale, or dealers; brokers of import transactions; owners and operators of automotive conversion and compliance facilities, equipped to comply with safety standards established pursuant to the Vehicle Safety Act; and owners and operators of specialized automotive testing laboratories, equipped to comply or verify compliance with emission standards established pursuant to the Clean Air Act.

If owners, importers for personal use, importers for sale, dealers, brokers, automotive conversion mechanics, and compliance testing laboratories involved in the gray market vehicle business do not

have standing to challenge the statute, then no individual or entity would have the requisite standing.

B. Mootness

The mootness issue need not cause delay.[15] We have ruled that Sims and the FICA have standing to bring this suit. Mootness and standing are related doctrines. Where a party challenges standing, the court inquires whether the plaintiff is entitled to relief. Where mootness is at issue, the court determines whether judicial activity remains necessary. Warth v. Seldin, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 2205 n. 10, 45 L.Ed.2d 343 (1975). Mootness demands that the plaintiff's personal interest in the

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[15] Before the panel and this in banc court, the parties agreed that the case is not moot. Because the panel raised the issue, we discuss it.

lawsuit (standing) continue to the lawsuit's end.

This case undoubtedly is not moot as to the FICA. The FICA presently has the same personal interest and stake in the lawsuit as it did on the date of filing. The FICA's members continue importing, converting, testing, and selling gray market vehicles. The Florida statute still delays the effective conduct of FICA members's businesses.

The state failed to make the only possible mootness argument regarding Sims. Sims received the bond release letter on September 18, 1985, after the district court trial which held the statute unconstitutional. One could argue that Sims's case became moot when she received the documents prior to the state's appeal. Because we decide the statute's constitutionality in this opinion, this

argument simply asserts that a gray market vehicle owner could never attack the Florida statute; the state could deliver the documents at any time, even after trial, resulting in the lawsuit's dismissal. The court would never determine the statute's constitutionality in a gray market vehicle owner's lawsuit because of litigation's inherent length and delays.

Although such an argument is legally and logically specious, we need not rely on its specious nature. The Supreme Court established the doctrine of "capable of repetition yet evading review" for application to mootness issues. Los Angles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). This doctrine allows federal jurisdiction to continue where seemingly no continuing controversy exists. The Supreme

Court held that mootness does not apply in these "exceptional circumstances" if a plaintiff can demostrate that the alleged injury is capable of repetition, but time constraints or other circumstances preclude the court's review. DeFunis 416 U.S. at 318-19, 94 S.ct. at 1706-07. Sim's injury is capable of repetition. The record shows that individuals import thousands of gray market vehicles into the United States each year. All of these vehicle owners who seek title and registration in Florida will suffer the same injuries as Sims, and similarly find themselves unable to attack the statute because the state ultimately, even after trial, delivers the documents. Consequently, effective reveiw of an owner's claim would never occur if we hold that delivery of the documents at any time, even after trial renders the owner's claim moot. This action is not moot.

C. Immunity

Sims and the FICA filed suit in the district court naming as defendants the State of Florida, the Department of Highway Safety and Motor Vehicles, and the Attorney General. Sims and the FICA then filed an uncontested motion to dismiss the Attorney General as defendant. The parties never named as defendant the Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles. Thus, the State of Florida and one of its agencies--the Department of Highway Safety and Motor Vehicles remain the only defendants in this action. "It is clear . . . that in the absence of consent a suit in which the state or one of its agencies or departments is named as the defendant is prescribed by the eleventh amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100,

104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984).

The state of Florida failed to plead sovereign immunity under the eleventh amendment as a defense to this constitutional challenge. The state never mentioned the eleventh amendment, not even at trial. In addition, the state did not initially raise the issue on appeal, but only raised sovereign immunity after this court requested that the parties brief the issue.

Sims and the FICA contend that this court unwarrantedly raised the eleventh amendment defense. They rely on the Supreme Court's statement: "[W]e have never held that [the eleventh amendment defense] is jurisdictional in the sense that it must be raised and decided by this court on its own motion." Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 515 n. 19, 102 S.Ct 2557, 2567 n.

19, 73 L.Ed.2d 172, 187 n. 19 (1982).

In response to the state's late and compelled sovereign immunity defense, Sims and the FICA moved this court to add the Director of the Division of Motor Vehicles as a defendant. We grant this motion, even though we would remand the sovereign immunity issue to the district court in other circumstances.[16] In this case, however, in light of the state's initial waiver of the defense, the state's reluctance to urge the issue before the in banc court, and the lack of prejudice to the state and its officials, the district court would clearly abuse its discretion if

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[16] The state of Florida's Attorney General has represented the state's interest in the lawsuit throughout the litigation. consequently, the lack of a state official's name in the style of the case has not prejudiced the state officials. We also note that the district court has granted injunctive relief.

it denied the motion to formally add as a defendant the Director of the Division of Motor Vehicles for the State of Florida.

CONCLUSION

In summary, we affirm the district court's ruling that Fla.Stat. § 320.02(9) violates the Clean Air Act, 42 U.S.C. § 7522 because Congress has exclusively reserved to the federal government the enforcement of federal emission standards. We reverse the district court's ruling that Fla.Stat. § 320.02(9) violates the Safety Act. Accordingly, we affirm in part and reverse in part.[17]

AFFIRMED in part and REVERSED in part.

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[17] Judge Clark did not participate in the decision of this case.

TJOFLAT, Circuit Judge, dissenting:

In its apparent haste to decide the constitutionality of Fla.Stat. § 320.02(9) (1987), the court cases over the jurisdictional requirements of well established precedent, and in so doing sets the stage for untold mischief in future cases. I respectfully dissent on four separate grounds.

First, in an effort to circumvent the eleventh amendment bar to this suit, the court, acting sua sponte, substitutes an individual for the State of Florida as the party defendant and then, without giving him notice and an opportunity to be heard, enters judgement against him. This maneuver, which has no foundation in the law, denies the newly named defendant due process in the most elementary and fundamental sense. Second, the majority today decides a case which is plainly moot

with respect to one of the two appellees, Myra Holladay Sims. Third, the majority entertains a claim that the remaining appellee, Florida Import and Compliance Association (FICA), lacks standing to assert. Finally, although Sims' and FICA's claims were cast as a case arising under the Constitution and laws of the United States, they are actually state law claims that raise a constitutional question in anticipation of a defense. These claims thus fall outside of the court's subject matter jurisdiction.

Because a full understanding of the claims that Sims and FICA present is essential to the proper resolution of these issues, for purposes of convenience, I begin in part I with an analysis of their claims which illustrates that the district court lacked subject matter jurisdiction to entertain this case. My subsequent remarks

are organized as follows: In part II, I address the mootness of Sims' claim; in part III, I discuss FICAs lack of standing; and in part IV, I criticize the court's decision to substitute an individual for the State as the party defendant without affording him any of the rudiments of due process.

I.

The complaint in this case presents two separate and distinct claims against the State of Florida; one brought by Sims, the other by FICA. In an effort to give the district court subject matter jurisdiction, Sims and FICA cast their claims as if they arose under the Constitution or laws of the United States, see 28 U.S.C § 1331

(1982).[1] Their claims, however, are not based on the Constitution or laws of the United States; rather, they are based on state law.

Sims alleges that under Florida law, the State, through its Department of Highway Safety and Motor Vehicles (the Department), is required to title and register[2] her gray market automobile because she has satisfied the requirements

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[1] 28 U.S.C. § 1331 (1982) provides: "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Because Sims and all of the members of FICA are citizens of the State of Florida, appellees could not invoke the district court's diversity of citizenship subject matter jurisdiciton. See 28 U.S.C. § 1332 (1982).

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[2] For convenience, I hereinafter use "title" to refer to the relief Sims seeks, namely the issuance of title to and registration for her gray market automobile.

Florida imposes on those who wish to title non-gray market automobiles, but that the state refuses to do so. See Fla.Stat. § 320.02(1)-(7). Anticipating the State's defense, Sims goes on to allege that the State has refused to title her vehicle because she has not complied with Fla.Stat. § 320.02(9) by providing the Department with proof, in the form of a bond release letter issued by the National Highway Transportation Safety Administration (NHTSA), that she has satisfied the requirements of the Federal Motor Vehicle Safety Act, 15 U.S.C. § 1397 (1982). Finally, in response to this anticipated defense, Sims presents the federal question that, she contends gives the district court, and consequently this court, subject matter jurisdiction to entertain her suit: whether Fla.Stat. § 320.02(9) is unconstitutional. In effect, Sims asks the

court to strike the State's defense as legally insufficient, see Fed.R.Civ.P. 12(f), and to issue an order compelling the Department to title her gray market automobile.[3]

FICA's claim, which is brought solely in a representative capacity for two groups

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[3] In addition to an order compelling the Department to title her gray market automobile, Sims also asks the court, in a common prayer for relief with FICA, to enjoin the future enforcement of Fla.Stat. § 320.02(9). Sims, however, does not allege that she intends to import another gray market automobile and therefore needs such relief. Because prospective relief is not necessary to make Sims' whole, and since equity does not grant that which is not needed, we should not read the complaint as including a prayer by Sims that the State be enjoined from enforcing § 320.02(9).

of claimants,[4] also arises under state, not federal, law. The first group of claimants consists of members who will both import gray market automobiles into Florida and satisfy Florida's requirements for titling non-gray market automobiles. The second group of claimants consists of FICA members, namely import brokers and mechanics, who charge fees to those who import gray market automobiles after their automobiles are conditionally admitted into the United States. These members contend that enforcement of Fla.Stat. § 320.02(9) is chilling importation of gray market automobiles and thus is causing them to

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[4] For simplicity, I refer to FICA's members collectively as importers, import brokers, and mechanics. See infra note 15 for the description of FICA's members contained in the complaint. In the text, I divide them into two groups; the first consisting of the importers, the second consisting of import brokers and mechanics.

lose business. Unlike Sims, however, no one in either group of FICA claimants seeks an order requiring the Department to title any existing gray market automobile. Rather, they seek in order requiring the Department to title any gray market automobile that may be imported into Florida in the future.

Once properly characterized, Sims' and FICA's claims obviously run afoul of the "well-pleaded complaint rule, " which prohibits a claimant from involing the district court's federal question jurisdiction by alleging that the defense that the defendant will raise is invalid under federal law. See C. Wright, Al. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3566 (1984). In the seminal case of Louisville & Nahsville R.R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), the

Supreme Court stated:

> It is not enough that the plaintiff alleges some anticpated defense to his cause of aciton, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

Id. at 152, 29 S.Ct. at 43. The Supreme Court has not wavered in its firm application of this rule, see e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-11, 103 S.Ct. 2841, 2846-47, 77 L.Ed.2d 420 (1983); Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28, 94 S.Ct. 1002, 1004, 39 L.Ed.2d 209 (1974), and we are bound to follow it.

In sum, the claims Sims and FICA present are founded on state law--the right

to recieve a title to an automobile is a creature of the Florida legislature, not the Constitution or laws of the United States.[5] The federal questions they raise concern only the constitutionality of the State's defense. In accord with the decision in Mottley, we should notice sua sponte the absence of subject matter jurisdiction and direct the district court, on receipt of our mandate, to dismiss the

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[5] If one considers how Sims would have proceeded had she filed suit in state court, the state law basis of Sims' claim becomes obvious. Sims would have petitioned the state circuit court (Florida's trial court of general jurisdiction) to issue a writ of mandamus compelling the director of the Department to title her automobile. The director, in his answer to Sims' petition, would have alleged that Sims was not entitled to relief because she had not complied with Fla.Stat. § 320.02(9). Sims, in turn, would have moved the court to strike that defense as insufficient on the gound that it was barred by federal law.

case.[6]

II.

I turn now to the issue of the mootness of Sims' claim. At the heart of this controversy is Sims' impatience with NHTSA's delay in issuing a bond release letter, required by Fla.Stat. § 320.02(9) to title a gray market automobile.[7] The majority acknowledges that on September 18, 1985--one week after trial and three months

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[6] The majority does not address this question--whether Sims' and FICA's claims are based on federal or state law. By ignoring it, the majority disregards its continuing duty to ensure that the district court had subject matter jurisdiction to entertain the case.

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[7] At the time Sims filed suit, NHTSA had a backlog of 14,000 complaince applications awaiting approval. Because of this backlog, an owner could expect to wait up to nine months for NHTSA to issue a bond release letter.

before the district court entered final judgment for Sims--NHTSA issued Sims her eagerly awaited bond release letter. Since Sims had already acquired the necessary documentation from the Environmental Protection Agency, she now had all the documents required by Fla.Stat. § 320.02(9), and nothing prevented her from obtaining a title for her automobile. Sims' attorney should have advised the court of this development immediately;[8] had he done so, the court would have asked counsel whether here was any need to continue the litgation, given that Sims had the power to obtain the precise relief she was asking the court to provide. There can

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[8] The Supreme Court has made it plain that counsel have an affirmative obligation to call the court's attention to facts which suggest mootness. See Board of License Comm'rs v. Pastore, 469 U.S. 238, 240, 105 S.Ct. 685, 686, 83 L.Ed.2d 618 (1985).

be no question that had the trial court been so informed, it would have dismissed Sims' claim as moot.[9]

Unfortunately, the fact that Sims' claim had become moot did not surface until oral argument before the three-judge panel which initially heard this appeal. During that argument, Sims' attorney, in response to an inquiry from the court, confessed that his client had received the NHTSA bond release letter prior to the entry of final judgment in the district court, and that the controversy with the State over her

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[9] The district court's dispositive opinion plainly relied on Sims' counsel's representation that NHTSA had not yet issued the bond release letter: "Sims still has not received a bond release letter from NHTSA, and it is not likely that she will receive one in the near future because in July 1985, NHTSA had 14,000 forms to review. The seed of Sims' complaint lies in this bureaucratic traffic jam."

automobile had ended.[10] Sims' attorney nonetheless urged the panel to proceed with the appeal and rule on the constitutionality of the Florida statute, contending that Sims' controversy with the State was not moot because it was capable of repetition, yet evading review.

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[10] Counsel of course recognized that the panel had a duty to satisfy itself that the controversy before it was still live. See C & C Prods., Inc. v. Messick, 700 F.2d 635, 636 (11th Cir. 1983) ("the case must be viable at all stages of the litigation; it is not sufficient that the controversy was live only at its inception."). Once an appellate court determines that the controversy has ended, it must remand the matter to the trial court with directions tht the judgment be vacated and the matter dismissed, see United States v. Munsingwear, Inc., 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-7, 95 L.Ed. 36 (1950), even when, as the majority notes, ante slip opinion at 829 n. 15, at___ n. 15, the parties desire a decision on the merits and "agree" that the case is not moot. See DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 1706, 40 L.Ed.2d 164 (1974).

The majority agrees with Sims that her case was not moot when the district court decided it. The majority does so by incanting the phrase "capable of repetition, yet evading review," ante slip opinion at 830, at ante, as if that phrase possessed some talismanic power to create an Article III controversy where, in truth, one does not exist. We know, of course, that the phrase contains no such power; rather, the doctrine merely defiens those situations in which a seemingly moot case still meets Article III's requirement of a genuine, concrete controversy. As the Supreme Court observed in Los Angles v. Lyons, 461 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983), and DeFunis v. Odegaard, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707, 40 L.Ed.2d 164 (1974), these situations are "exceptional" and require the plaintiff to prove that the doctrine's

two requisites are met. See Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 379, 46 L.Ed.2d 350 (1975).

Because Sims' claim became moot before the district court entered final judgment, we must look to the record as it stood when the court entered judgment in determining whether the claim was capable of repetition, yet evading review. If that record discloses evidence from which the court could reasonable have concluded that the claim was likely to recur and, if so, would evade review, then the district court had the authority to adjudicate the claim.

The record discloses no evidence to satisfy the first requirement of the doctrine, that the claim is likely to recur; consequently, we need not determine whether the second requirement evading review, has been met. What the record reveals is a controversy involving a single

automobile, a 1976 Mercedes-Benz 450 SEL, that Sims brought to the Port of Jacksonville on April 30, 1985. There is simply nothing in Sims' complaint or her testimony at trial from which the district court could have found that this controversy might recur,[11] much less, as the cases require, that there was a "resonable likelihood" or "demonstrated probability" that Sims would assert the same claim against the State at some time in the future. See Honig v. Doe, U.S. ___, ___, n. 6, 108 S.Ct. 592, 601 n. 6, 98 L.Ed.2d 686. The majority does not

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[11] The "mere possibility" that Sims would bring another gray market automobile into Florida would not have been enough to satisfy the "capable of repetition" requirement and thereby create an article III controversy for the district court to decide. See Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982); Morgan v. Roberts, 702 F.2d 945, 947 (11th Cir.1983).

even attempt to say how Sims' claim might satisfy this requriement--because, I believe, the attempt would be futile.[12] Instead, the majority simply states that the record shows that a number of other individuals will import gray market automobiles into Florida and will suffer the same injuries as Sims. Because this is not a class action, a showing of future injury to others is immaterial to the issue

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[12] Sims suggests in her brief to this court on rehearing en banc that her controversy with the State might recur when she seeks to re-register her automobile each year as requried by Fl.Stat. § 320.055. This suggestion is baseless for two reasons. First, a controversy over re-registration would not be a recurrence of the controversy described in Sims' complaint. Second, assuming that it would be, there is no reason to believe that any such controversy will arise because we know that Sims possesses the documents requrired for annual re-registration under Fla.Stat. § 320.055, which are the same as those required for initial registration under Fla.Stat. § 320.02(9).

of whether Sims' claim will, itself, recur. The law therefore requires that we dismiss Sims' claim as moot because she has not shown a "reasonable likelihood" or "demonstrated probability" that it will recur.

III

Because Sims' claim is moot, we have ajurisdiction to entertain this appeal only if the remaining appellee, FICA, has standing on its own to attack Fla.Stat. §320.02(9). The standing doctrine, like

the mootness doctrine,[13] is an aspect of article III's "case or controversy" requirement. As the Supreme Court has stated:

> the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the "controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect

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[13] The standing and mootness inquiries are closely related. See Warth v. Seldin, 422 U.S. 490. 499 n. 10, 95 s.Ct. 2197, 2205 n. 10, 45 L.Ed.2d 343. The standing inquirey asks whether the plaintiff--as opposed to someone else--is entitled to relief, while mootness focuses on "whether the occasion for judicial intervention persists." Id. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973), cited in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980).

> against injury to the complaining party, even though the court's judgment may benefit others collaterally. If federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the puntatively illegal action."

Warth v. Seldin, 422 U.S. 490. 498-99, 95 s.Ct. 2197, 2205, 40 L.Ed.2d 343 (1975) (citations omitted).

FICA concedes that it is not injured by the Department's enforcement of the statute and consequently does not assert on its own behalf the statute's unconstitutionality.[14] FICA contends, however, that the Department's enforcement of the statute affects a number of its

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[14] To have standing in its own right FICA would have to allege injury to itself, as an association, rather than to its members. See Center for Auto Safety v. National Highway Traffic Safety Admin., 793 F.2d 1322, 1328-29 n. 41 (D.C.Cir.1986).

members and argues that it may litgigate their claims in a representative capacity.[15]

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[15] In the complaint, FICA alleged that it comprised of

> persons and Florida business entities who support improving opportunities for commerce with foreign nations in the importation, use and sale in the United States of foreign-manufactured automobiles that are coverted in this country to comply with emission and safety standards of the Clean Air Act and the Vehicle Safety Act. Plaintiff FICA's members include importers automobiles for their personal use as well as importers for sale, or dealers; brokers of import transactions; owners and operators of automotive conversion and compliance facilities, equipped to comply with safety standards established pursuant to the Vehicle Safety Act; and owners and opeators of specialized automotive testing laboratories, equipped to comply or verify compliance with emission standards established pursuant to the Clean Air Act.

The record discloses almost nothing else about FICA. The only other reference to

Although an association such as FICA may, in some circumstances, have "representative standing" to litigate the claims of its members, see Warth, 422 U.S. at 411, 95 S.Ct. at 2211-12, it may do so only if its members would have standing in their own right, had they brought suit themselves. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-45, 97 S.Ct. 2434, 2441-42, 53 L.Ed.2d

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(footnote con't)

FICA is contained in the testimony of Gary Sims, appellee Sims's husband, who is the secretary of FICA. Gary Sims testified that FICA "is a group of individuals that either import automobiles as dealers, they convert them as conversion people, they sell the automobile parts to the people who convert them, they,--they own the testing facilities, they are individuals who import cars for their personal use."

838 (1977)[16] For the members of FICA to have standing in their own right, they would have to show that they have suffered an actual or threatened injury that is legally cognizable, fairly traceable to the allegedly illegal conduct, and likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Chruch & State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); see also Allen v.

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[16] In addition, FICA must show that "the interests it seeks to protect are germane to the [association's] purpose [and that] neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct 2434, 2441, 53 L.Ed.2d 838 (1977); see also Pennell v. City of San Jose, ___ U.S. 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988); International Union, United Auto, Aero. & Argic. Implement Workers of America v. Brock, 477 U.S. 274, 281-82, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986).

Wright, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984).

FICA attempts to meet its burden of establishing its members's standing by alleging that Fla.Stat. § 320.02(9) injures its members who import gray market automobiles for commercial or personal use by denying them the right to obtain Florida title, and in effect, the right to drive their gray market automobiles. With respect to its other members--import brokers and mechanics--FICA alleges that they are injured indirectly: because the statute effectively prohibits owners from titling and driving their gray market automobiles pending final admission into the United States, Florida residents may no longer wish to import gray market automobiles; as a result, the business of the import brokers, who assist owners in the importation of gray market automobiles,

and of the mechanics, who modify such automobiles to bring them into compliance with federal emissions and safety standards, will decline. On the basis of these allegations, FICA represents that its "members would have standing to sue in their own right for the relief requested."

In my veiw, FICA's allegations of fact are insufficient as a matter of law to demonstrate that FICA has standing to challenge the State's enforcement of the statute on behalf of either group of members. I make this statement after accepting as true FICA's allegations of fact regarding standing, as Warth

commands.[17]

FICA lacks standing to sue in behalf of the first group--the importers--because the

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[17] The Supreme Court in Warth stated:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiffs standing does not adequately appear from all materials of record, the complaint must be dismissed.

422 U.S. 490, 501-02, 95 S.Ct. 2197, 2206-7 (1975) (citations omitted). In order to determine the standing question, I not only take the allegations in the complaint as true, but I also deem FICA's complaint as amended to conform to any evidence relevant to standing introduced at trial. see Fed.R.Civ.Pr. 15(b).

complaint does not identify anyone who has been or will be denied title as a result of the Department's enforcement of Fla.Stat. § 320.02(9). Indeed, all that the complaint alleges is that "importers of automobiles for their personal use as well as for resale . . . support improving opportunities for commerce with foreign nations in the importation, use and sale in the United States of foreign-manufactured automobiles"[18] and, presumably, want Fla.Stat. § 320.02(9) declared unconstitutional. This allegation, by itself, is plainly insufficient to establish injury to the importers.

The importers' case is

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[18] At trial, FICA presented no further evidence concerning the standing of this group of members; hence, we must decide the standing of this group, and thus of FICA, on the basis of the factual allegations quoted in the text.

indistinguishable from the home builders Association (Home Builders) brought suit against the town of Penfield, New York. Home Builders contended that the town's ordinance prohibiting low-income housing deprived its members of "substantial business opportunties and profits," Warth, 422 U.S. at 515, 95 S.Ct. at 2213, and sought an order enjoining the ordinance's enforcement. Home Builders alleged that its members were injured by the ordinance, but failed to identify any member who had attempted to build a low-income housing project in Penfield. The district court dismissed Home Builders' complaint for lack of standing. The Court of Appeals for the Second Circuit affirmed. Home Builders thereafter sought review in the Supreme Court.

The Supreme Court agreed with the conclusion of the lower courts and held

that Home Builders lacked standing to attack the ordinance. The Court stated:

> [Home Builders] can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit. No such allegations were made. The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders'members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, . . . Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Warth, 422 U.LS. at 516, 95 S.Ct. at 2214. Similarly, in Anderson v. City of Alpharetta, 770 F.2d 1575, 1582-83 (11th

Cir.1985), we affirmed the district court's holding, which followed Warth's analysis, that an organization that operated a service to find housing for low-income minority families lacked standing to challenge a statute that forestalled development of a particular housing project because the organization because the organization failed to allege that any specific individual had sought, or would seek, housing in the area of the project. In the case before us, as in Warth and Anderson, no factual basis exists in the record to support a finding that FICA's

members have been or will be injured.[19] In the absence of such a basis, we must conclude that FICA lacks standing to maintain this suit on behalf of its members who import gray market automobiles for personal or commercial use.

Nor has FICA demonstrated that it has standing to sue on behalf of its second group of members--import brokers and mechanics. FICA has not identified any one in this group whose business has been adversely affected by the enforcement of

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[19] The holdings of Warth and Anderson are squarely on point and would seem to control our decision. Inexplicably, the majority ignores these holdings. It cites Warth solely for the elementary principle that in ruling on a motion to dismiss for lack of standing, a court must accept the plaintiff's allegations of fact as true, and it fails even to acknowledge Anderson's existence. What are the district judges of our circuit to do the next time a defendant challenges the plaintiff's standing under Warth and Anderson, and the plaintiff, in response, cites today's holding?

Fla.Stat. § 320.02(9). Furthermore, even if FICA had identified someone, there are two reasons why such member, and thus FICA, would lack standing to challenge the statute.

First, the indirect injury the import brokers and mechanics allege that they will suffer is too remote and uncertain to constitute the "injury in fact" required for standing. The possibility that the future enforcement of the statute may cause a significant decrease in the importation of gray market automobiles and that, as a consequence, the import brokers and mechanics may suffer a loss of business is highly speculative, and "'unadorned speculation will not suffice to invoke the federal judicial power.'" Diamond v. Charles, 476 U.S. 54, 66, 106 S.Ct. 1697, 1705, 90 L.Ed.2d 48 (1986) (citing Simon v. Eastern Kentucky Welfare Rights Org., 426

U.S. 26, 44, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450 (1976) (denying standing to a pediatrician who argued that enforcement of a law requiring doctors to preserve the lives of aborted fetuses would enlarge the pool of his potential fee-paying patients). The burden is on the plaintiff to allege concrete injury that is "distinct and palpable" and not "abstract" or "hypothetical." Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

If, as a matter of policy, we were to follow the majority's approach and disregard this limitation on the standing those alleging indirect injury, then we would also have to recognize the claims of anyone else who might allege that the enforcement of Fla.Stat. § 320.02(9) hurt his business. I can think of scores of possible plaintiffs who could allege that

"but for" the State's enforcement of the statute, they would have been better off economically: the banks that would have financed the purchase of the gray market automobiles that were not imported; the banks' employees; the Port of Jacksonville that would have received the automobiles that were not imported; the Port's employees; the shipping, trucking, and rail companies that would have transported the imported automobiles to their ultimate destination. In short, under the majority's approach to standing, the universe of possible plaintiffs is endless.

Even if the import brokers and mechanics could show that they suffer a sufficiently concrete injury, their standing in this case has a second defect: the right which they seek to assert--the right to obtain title to a gray market automobile--is not theirs, but

rather belongs to the automobile owners. Prudential limitations on the standing doctrine require that "the plaintiff generally must assert his own legal rights or interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499, 95 S.Ct. at 2205; see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 955, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984). The reasons for this rule are twofold. "The limitation 'frees the Courts . . . from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." Joseph H. Munson, 467 U.S. at 955, 104 S.Ct. at 2846 (citing United States v. Raines, 362 U.S. 17, 22, 80 S.Ct. 519, 523,

4 L.Ed.2d 524 (1960).[20] This rule requires us to hold that the import brokers and mechanics do not have third party standing to challenge Fla.Stat. § 320.02(9).

Finally, I address the majority's assertion that if the various groups of FICA members "do not have standing, then no individual or entity would have the requisite standing." Ante slip opinion at 829, at _____. The majority makes this assertion, in a last ditch effort to find standing for FICA's claim, squarely in the face of Supreme Court pronouncements that such an assertion is meaningless. As the

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[20] The limitation is subject to exception where there is (1) a close relationship between the third party and the party whose rights are asserted, and (2) the existence of obstacles preventing the latter from asserting its rights on behalf of itself, see Singleton v. Wulff, 428 U.S. 106, 113-116, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826 (1976), but these conditions are not present in this case.

Supreme Court has repeatedly stated, "'[t]he assumption that if [the plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" See Valley Forge Christian College v. Americans United for Separation of Chruch and State, 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 705 (1974)).

To summarize, I conclude that none of FICA's members have standing to challenge Fla.Stat. § 320.02(9). FICA therefore lacks "representational standing" to challenge the statute on their behalf. Because Sims' claim is moot and FICA lacks standing, no "case or controversy" exists over which this court may exercise its judicial power. We therefore should remand

this case to the district court with the instruction that it be dismissed.

IV

This case began as a suit against the State and one of its agencies--a suit barred by the eleventh amendment.[21] It is well settled that, in the absence of the state's consent, only suits seeking

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[21] The eleventh amendment provides:

> The Judicial power of the United states shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. As it has been interpreted, the eleventh amendment proscription applies to suits brought by a citizen against his own state or an agency of the state. See Hans v. Louisiana, 134 U.S. 1, 10, 10 S.Ct. 504, 505, 33 L.Ed. 842 (1890); see also Welch v. State Dep't of Highways & Public Transp., U.S. ____, 107 S.Ct. 2941, 2945-46, 2949-53, 97 L.Ed.2d 389 (1987).

injunctive relief against a named state official, as opposed to a state department or agency, are exempted from the eleventh amendment proscription. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984). The complaint filed by Sims and FICA does not fall within this exemption because it did not name the director of the Department of Highway Safety and Motor Vehicles or any other state official as a

party defendant.[22] The majority recognizes that this suit cannot be maintained against the named defendants--the State of Florida

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[22] The complaint named the Attorney General of Florida, Jim Smith, as a defendant solely because Fla.Stat. § 86.091 (1987) requires the plaintiff in a suit in state court that challenges the constitutionality of a Florida statute to notify the Attorney General of the suit by serving him a copy of the complaint. This statute does not apply to suits in federal court. Accordingly, since Sims and FICA sought no relief against the attorney general, they moved the district court to dismiss him from the case. The State, having no reason to oppose the motion, agreed to the dismissal, and on August 29, 1985 the district court entered an order dropping the attorney general as a party defendant.

and the Department.[23]

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[23] The majority seems to recognize this point reluctantly. The majority notes that the State did not present the sovereign immunity defense until the panel that initially considered this appeal raised the issue, and appears to criticize the panel for doing so with the following statement: "'[w]e have never held that [the eleventh amendment defense] is jurisdictional in the sense that it must be raised and decided by this court on its own motion.' Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2567 n. 19 [73 L.Ed.2d 172] (1982)." See ante slip opinion at 830, at ____.

Although the state did not plead the sovereign immunity defense in the district court, the "defense sufficiently partakes of the nature of a jurisdictional bar so that it need not [have been] raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974). Patsy does not prohibit an appellate court from sua sponte raising the issue of sovereign immunity, as the majority implies. The Supreme Court, in Patsy merely noted that, because the parties before it had not briefed the eleventh amendment issue and because the possibility existed that the state had statutorily waived the defense as to the particular circumstances of the suit, the Court deemed it inappropriate for it, rather than the district court, to decide the issue. Patsy, 457 U.S. at 515 n. 19,

Yet, instead of vacating the district court's judgment and remanding the case to the district judge for the entry of a

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(footnote con't)

102 S.Ct. at 2567 n. 19. The Court therefore reversed the district court's dismissal, which was based on an erroneous view that exhaustion of state remedies is required in section 1983 cases, and suggested that the district court address the eleventh amendment question on remand. Id. In contrast to Patsy, both parties to this action have fully briefed the eleventh amendment issue, and at oral argument before the en banc court the State vigorously pressed for dismissal on eleventh amendment grounds. Also in contrast to Patsy, there is no possibility that the State has waived sovereign immunity in this case. The Florida constitution requires "specific, clear, and unambiguous language in a statute to constitute a waiver of sovereign immunity." Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla. 1978). Sims and FICA have not argued, nor has this court uncovered, the existence of such a legislative enactment. Accordingly, the panel's action in raising the eleventh amendment issue was not "unwarranted."

judgment of dismissal,[24] the majority, acting sua sponte, simply substitutes an individual--the director of the

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[24] This court could defer ruling on the jurisdictional issues that I have discussed and, as an alternative disposition, direct that on receipt of our mandate the district court grant the plaintiffs leave to amend their complaint--by dropping the State and the Department from the suit, substituting for them the director of the Department as party defendant, and making new allegations of fact demonstrating the director's liability to the plaintiffs--and then, that process be served upon the new defendant. The majority tacitly rejects this alternative because such a disposition would, obviously, prevent it from deciding the constitutionality of Fla.Stat. § 320.02(9). Moreover, the majority knows that if this case were remanded to the district court--with instructions that the court grant the plaintiffs leave to amend, as described above--the merits may not be reached. After granting the plaintiffs leave to amend, the district court might dismiss the case for lack of subject matter jurisdiction or a justiciable controversy because Sims' claim is moot and FICA lacks standing to sue.

Department[25]--for the State as the party defendant, and then enters judgment against him. As the following discussion manifests, the majority's maneuver, which is accomplished without any advance notice to the director, is not only unprecedented, it is unprincipled, constituting a denial of due process in the most elementary and fundamental sense.

Due process--for that matter common sense--requires that an individual against whom a permanent injunction is to be entered be given notice of the claims against him and an opportunity to be

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[25] After the three-judge panel assigned to this case raised the eleventh amendment issue at oral argument, Sims and FICA filed a motion to add Charles Brantley, the director of the Department, as a party defendant. The panel denied the motion on May 26, 1987, and Sims and FICA have not renewed it. The court therefore acts sua sponte in substituting Brantley as the party defendant at this time.

heard. See generally Fed.R.Civ.P. 65; see also C. Wright & A. Miller, Federal Practice and Procedure § 2956 (1973). Where, as here, the individual does not voluntarily appear in the case and consent to the entry of judgment, due process requires that he be served with process and given a chance to respond to his adversary's claim. To me, this notion is "due process in the primary sense," Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161, 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951) (Frankfurter, J.) (quoting Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930)). "It is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court." Galpin v. Page, 85 U.S. 350, 368 (18 Wall.), 21 L.Ed 959 (1873).

I have no doubt that the judges making up the majority subscribe to this principle of fairness. They could have honored this principle by vacating the district court's judgment and remanding the case to the district court with instructions that that court either dismiss the plaintiffs' suit without prejudice or permit the plaintiffs to amend their complaint, substitute the director of the Department as the party defendant, and begin their case anew--as I have noted. See supra note 24. But this would have denied the majority the power, under article III, of deciding the constitutionality of Fla.Stat., § 320.02(9). The majority knows that if we were to decide the constitutionality of this statute and at the same time vacate the district court's judgment, we would be rendering an archetypical provisional decision--the sort of decision article III

precludes us from making. See Escambia County v. McMillan, 466 U.S. 48, 51, 104 S.Ct. 1577, 1579, 80 L.Ed.2d 36 (1984) (federal courts do not decide constitutional questions unnecessarily.); Flast v. Cohen, 392 U.S. 83, 96, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968) ("'[T]he oldest and most consistent thread in the federal [law] of justifiability is that the federal courts will not give advisory opinions.'") (quoting C. Wright, Federal Courts 34 (1963)). Our decision would be provisional because it would take effect only if the district court, on remand, granted the plaintiffs leave to amend, rejected the jurisdictional arguments I have advanced here, and reached the merits of the plaintiffs' constitutional attack on the Florida statute. Only then would our provisional decision have meaning; it would be persuasive authority for the decision on

the merits that the district court would then be called upon to make.

The only way the majority can decide this case without transgressing article III's prohibition against provisional decisions is to do what it has done; substitute the director of the Department for the State as the party defendant and treat the district court's judgment as having been entered against him. This is not a case, however, in which the law permits such a substitution. A court of appeals can substitute a state official as the party defendant only in cases in which his predecessor in office has been sued in his official capacity. In such cases, Fed.R.App.P. 43(c)(1) provides for substitution automatically; the successor official becomes bound to the district court's judgment without being served with process and accorded a hearing. A hearing

is not required because the law presumes that the successor's interest, qua office holder, has been fully represented in the proceedings by his predecessor.

This is, instead, a case in which the new party's predecessor has never appeared in the case; consequently, due process requires that the new party be served with process and provided an opportunity to be heard. This is the necessary, and plain, implication of Rule 43(d)(1): unless the new party is the "successor" of a "public officer" who has been sued "in his official capacity," due process precludes his automatic substitution at the appellate level as inherently prejudicial.

The majority circumvents Rule 43(c)(1) by fashioning a new rule; a state official may be substituted for the state as the party defendant where the state fails to plead the sovereign immunity defense in the

district court and is reluctant to urge the defense on appeal, and neither the state nor its substituted official will be prejudiced by the substitution.[26] The majority implies that it would have granted the director the right to service of process and a hearing--in the district court--if the state had not "reluctantly" raised the sovereign immunity defense. The majority also implies that it would have granted the director such fundamental due process if its sua sponte issuance of the

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[26] In the majority's words, its action in substituting the director as the party defendant; and binding him to the district court's injunction cannot be considered as unfair because of "the state's initial waiver of the defense, the state's reluctance to urge the issue before the in banc court, and the lack of prejudice to the state and its officals, ..." See ante slip opinion at 831, at ____.

injunction against the director,[27] and its subjection of him to the district court's contempt power, worked any prejudice against him.

Finally, even if it could be said that the majority's new rule is valid--that it passes constitutional muster and is not foreclosed by Rule 43(c)(1)--I would remand the case to the district court to accord the director his due process rights. I would do so because, contrary to the majority's view, (1) the state's urging of the sovereign immunity defense has not been "reluctant," and (2) enjoining a state officer without notice and an opportunity to be heard is inherently prejudicial.

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[27] The en banc court's decision binding the director, in his official capacity, to the injunction issued against the State and the Department is tantamount to the issuance of an injunction against him.

V.

For the foregoing reasons, I respectfully dissent.

COX, Circuit Judge, dissenting:

I concur in Part IV of Judge Tjoflat's dissenting opinion, and I would not reach the other issues presented.

APPENDIX B1.

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION
Plaintiffs--Appellees,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant--Appellant.

No. 86-3055.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

Dec. 2, 1987.

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, District Judge.

HATCHETT, Circuit Judge

The State of Florida, and the Department of Highway Safety and Motor Vehicles, appeal from the district court's declaration that Florida Statute §

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* Honorable Joe Eaton, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

320.02(9) is unconstitutional because it is preempted under the supremacy clause and violates the commerce clause of the United States Constitution. We affirm in part and remand.

FACTS

On April 30, 1985, Myra Holladay Sims imported from Europe an automobile popularly known as a "gray market" automobile.[1] "Gray market" automobiles are imported automobiles which are not designed or maufactured to comply with United States emissions and safety standards. Florida Import and Compliance Association (FICA) is a trade association whose members are directly involved in the importation of

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[1] Sims purchased the used 1976 Mercedes Benz 450 SEL from Ulrich Kieserwalter of Bonn, West Germany.

gray market automobiles.

Two federal statutes govern the importation of foreign manufactured automobiles into the United States. The Clean Air Act, 42 U.S.C. § 7522, and the Safety Act, 15 U.S.C. § 1397, bar the importation of motor vehicles that do not comply with the applicable federal emissions and safety standards. Specifically, the Clean Air Act prohibits

> the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations

prescribed [by this statute][2]

42 U.S.C. § 7522(a)(1). Also, under

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[2] The definition of "new car" under the Clean Air Act as it relates to gray market automobiles is not based on whether the automobile has previously been sold prior to its importation into the United States:

> (3) Except with respect to vehicles or engines imported or offered for importation, the term 'new motor vehicle' means a motor vehicle the equitable or legal tile to which has never been transferred to an ultimate purchase; and the term 'new motor vehicle engine' means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser; and with respect to imported vehicles or engines, such terms mean a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).
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> 42 U.S.C. § 7550(3) (emphasis added).

section 7522(b)(2), the statute provides that

> [t]he Secretary of the Treasury and the Administrator [of the Environmental Protection Agency (EPA)] may, by joint regulation provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to ensure hat any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, clause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate customer, of a new motor vehicle or new motor

> vehicle engine that fails to comply with applicable standards of the Administrator under this part.

Similarly, the Safety Act provides that "[n]o person shall manufacture for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle [unless it is in conformity with applicable federal motor vehicle safety standards]." 15 U.S.C. § 1397(a)(1)(A). In addition, that statute provides as follows:

> [T]he Secretary of the Treasury and the Secretary [of the National Highway Transportation Safety Administration, Department of Transportation (DOT)] may, by . . . regulations, provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment into the United States upon such terms and conditions (including furnishing of a bond) as may appear to them appropriate to ensure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable federal motor vehicle safety standard prescribed under

> this subchapter, or will be exported or abandoned to the United States.

15 U.S.C. § 1397(b)(3).

Despite general prohibitions against the importation of nonconforming motor vehicles into the United States, Congress, under the above provisions, authorized the importation of gray market vehicles upon the furnishing of a bond or other means of assuring that federal environmental and safety laws are not unlawfully circumvented. The EPA, the DOT, and the Treasury Department promulgated regulations governing the importation of gray market vehicles. See generally 19 C.F.R. §§ 12.73, 12.80; 40 C.F.R. Part 85, Subpart P and 49 C.F.R. Part 571. Under these regulations, a gray market vehicle is conditionally admitted into the United States for limited purpose of enabling the importer to comply with federal emissions

and safety laws. The importer must post an entry bond with the United States Customs Service (Customs) for an amount equal to the value of the vehicle plus the customs duty. See Automobile Importers Compliance Association, Handbook of Vehicle Importation, 21 (1984). In addition, the importer must sign a statement indicating that the motor vehicle emission standards but will be brought into conformity with such standards." 19 C.F.R. § 12.73(b)(5)(x) (1986). Finally, the importer must declare that the vehicle "was not manufactured in conformity [with] all applicable safety standards, but it has been or will be brought into conformity."

19 C.F.R. § 12.80(b)(1)(iii).[3]

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[3] Title 19 C.F.R. § 12.80(b)(1)(iii) reads as follows:

(b) Requirements for entry and release.

(1) [E]ach vehicle...offered for introduction into the Customs territory of the United States shall be denied entry unless the importer or consignee files with the entry a declaration, in duplicate, which declares or affirms one of the following:

. . .

(iii) The vehicle or equipment item was not manufactured in conformity [with] all applicable safety standards, but has been or will be brought into conformity. Within 120 days after entry, or within a period not to exceed 180 days after entry, if additional time is granted by the Administration, National Highway Traffic Safety Administration ("Administrator, NHTSA)"), the importer or consignee will submit a true and complete statemnt to the Administrator, NHTSA, identifying the manufacturer, contractor, or other person who has brought the vehicle or equipment item into conformity, describing the exact nature and extent of the work performed, and certifying that the vehicle or equipment item has been brought into conformity, and that the vehicle or equipment item will not be sold or offered for sale until the Administrator, NHTSA, issues an approval letter to the district director stating that the vehicle or equipment item described in the declaration

The entry bond serves as a means to enforce the importer's obligation to comply with the requirements of federal emission and safety standards. Thus, Customs will not release the bond until it receives assurance from the EPA and the DOT that the importer has complied with the standards. See 19 C.F.R. §§ 12.73c and 12.80e.

When Sim's automobile arrived at port in Jacksonville, Florida, she complied with all of the applicable federal regulations governing the importation of gray market automobiles, which included posting a bond in the requisite amount. Sims was exempt from conforming her automobile to the applicable federal emission standards and received a letter from the EPA releasing

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has been brought into conformity with all applicable safety standards.

the EPA obligation on the bond.[4] In complying with the Safety Act and the DOT regulations, Sims completed the requirements under 19 C.F.R. § 12.80(b)(1)(iii).

In 1984, the Florida legislature passed the following statute concerning automobile titling and registration:

> Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by

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[4] The importer of a vehicle, more than five years old and imported for personal use and not for resale, is entitled to a once-in-a-lifetime exemption from the Clean Air Act's emission standards. The exemption is granted automatically by the EPA, but the importer is still required to comply with the requirements of the Safety Act and the DOT. In addition, the importer is not permitted to sell the vehicle for two years after importation. See generally United States EPA, Automotive Imports--Fact Sheet 76 (1983).

> the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. A vehicle which is registered pursuant to this subsection shall not be titled as a new motor vehicle.

Act approved June 11, 1984, ch. 84-155, § 3, 1984 Fla.Laws 457, 458 (codified as amended at Fla.Stat. § 320.02(9) (1985)). This provision prevents the owner of a gray market vehicle from acquiring title and vehicle registration in Florida until the owner has obtained the required documentation from the federal government.

Subsequent to the passage of Fla.Stat. § 320.02(9), Sims unsuccessfully sought to title and register her automobile at the Florida Department of Highway Safety and Motor Vehicles (DMV). The DMV refused to title and register Sims's automobile because she did not produce release letter

from the DOT and Customs certifying compliance with federal standards. Sims had not received a bond release letter from the DOT because of the excessive number of forms the DOT had to review.[5]

Following refusal to title and register the automobile, Sims and the FICA filed suit in United States District Court for the Northern District of Florida alleging that the state's enforcement of section 320.02(9) violated the supremacy and commerce clauses of the United States Constitution: (1) the Clean Air Act and the Safety Act preempt the state's authority to require compliance with federal emission and safety standards, and (2) enforcement of section 320.02(9) places an impermissible burden of foreign and

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[5] In July, 1985, the DOT had 14,000 compliance forms to review.

interstate commerce. The district court concluded that the Clean Air Act and Safety Act preempted the state's authority to enforce section 320.02(9) and the enforcement of the statute would violate the commerce clause. The district court declared section 320.02(9) unconstitutional and enjoined its enforcement. The state brings this appeal from the district court's ruling.

On September 29, 1986, we heard oral arguments addressing whether Fla.Stat. § 320.02(9) violates the supremacy and commerce clauses of the United States Constitution. On February 18, 1987, we requested "all counsel of record" to submit supplemental briefs addressing (1) standing, (2) Florida's sovereign immunity under the eleventh amendment, and (3) mootness. The parties complied with our

request.[6]

DISCUSSION

A. Standing

The state of Florida alleges that Sims and the FICA lack standing to challenge the constitutionality of Fla.Stat. § 320.02(9) because they have failed to show (1) a judically cognizable injury traceable to the enforcement of the statute, and (2) the likelihood of redress if the Florida statute is declared preempted or in violation of the commerce clause. "[T]he question of standing is wnether the litigant is entitled to have the court decide the merits of the dispute or of

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[6] In addition to complying with our request, the parties bombarded the court with frequent, profuse, numerous, and sundry motions and pleadings. The motions not directly ruled upon this opinion are denied.

particular issues." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). In order to satisfy the requirements of standing, a plaintiff must allege a personal injury fairly traceable to the challenged conduct and likelihood of redress by the requested relief. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

Sims and the FICA allege that the state's enforcement of Fla.Stat. § 320.02(9) violates the supremacy and commerce clauses of the United States Constitution because it prevents the owner of a "gray market" vehicle from acquiring tile and registration in Florida prior to release of the entry bond and final admission of the vehicle into the United States.

We note that whether the appellees have sufficiently alleged standing is not determined by the likelihood that they will prove what has been alleged. The Supreme Court's ruling in Warth, 422 U.S. at 501, 95 S.Ct. at 2206, requires the courts to "accept as true all material allegationsof the complaint, and . . . construe the complaint in favor of the complaining party." See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). In satisfying the initial requirement under the Article III doctrine relating to standing--an allegation of "a distinct and palpable injury," Warth, 422 U.S. at 501, 95 S.Ct. at 2206. Sims and the FICA's complaints allege that the state's enforcement of section 320.02(9) unlawfully prevents the tiling and registering of gray market vehicles in Florida. In assuming, as we

must, the truth of the allegations, the state's unlawful refusal to issue titles and registrations to owners of gray market vehicles constitutes a distinct, palpable, and personal injury to Sims and the FICA.

Also, Sims's and the FICA's complaints contain assertions sufficient to establish the second requirement necessary to show standing--the likelihood of redress by the requested relief. Absent the state's enforcement of section 320.02(9), Sims and other owners of gray market vehicles would immediately have their vehicles titled and registered in Florida. Federal statutes do not prohibit the titling and registering of gray market vehicles prior to final admission; similarly, the DOT does not prohibit the operation of gray market vehicles on public highways prior to the

issuance of a release letter.[7] Only the

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[7] Only DOT's February, 1985, general report to the appropriations committees included the following:

> Claims have been made and evidence presented to the agency that there are many vehicles supposedly brought into conformance with the safety standards that, upon inspection, are not in conformance with the standards. There are several reasons for the presence of noncomplying vehicles in the mainstream of the vehicle population, some of which are fully lawful. Nonconforming vehicles in the general vehicle population because of unlawful activity are of concern to NHTSA and form the basis of many penalty recommendations. The reasons for nonconforming vehicles being present in the general vehicle population are:
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> . . .
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> 3. The vehicle was entered under bond conditional upon its being brought into conformity within 120 days after entry or within 180 days when an extension is granted. The vehicle cannot be sold prior to release of the bond but can be used on the highways prior to completion of the modifications and its subsequent release. However, more than 7 states do not allow a vehicle to be titled and

EPA, under Title 40 C.F.R. § 85.1507 (1985), requires that gray market vehicles "be stored and . . . not . . . operated on the public highways [prior to] final admission.[8] The state's argument is that since Sims and other owners of gray market

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> registered until the vehicle has been released by NHTSA.

NHTSA, Importation of Motor Vehicles and Items of Motor Vehicle Equipment, 19 C.F.R. § 12.80 (Feb. 1985).

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[8] Section 85.1507 reads as follows:

> Storage and Prohibited Operation or Sale of Vehicles or Engine Conditionally Admitted a motor vehicle or engine conditionally admitted pursuant to section 85.1503, section 85.1504, or section 85.1505 shall be stored and shall not be operated on the public highways or sold until such vehicle or engine has been granted final admission. Failure to comply with this provision shall constitue a violation of section 203(a)(1) of the Clean Air Act, as amended.

vehicles are prohibited by section 85.1507 from operating such vehicles on the state roads until final admission is granted, they have no reason to seek titling and the registration of these vehicles. Such a contention amounts to mere speculation as to the owner's need for, or the reason for which the owner seeks titling and registration. Moreover, Fla.Stat. § 320.02(1) does not prohibit the registration of vehicles that are not operated on Florida roads. We cannot conclude that titling and registration of a gray market vehicle are necessary only for the operation or sale of the automobile.[9] In this case, we also find that Sims and

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[9] A possible alternative need the owner of a gray market vehicle may have for a certificate of tile is the securing of bank financing to assist in the purchasing of the automobile.

the FICA have sufficiently alleged a distinct, palpable, and personal injury in the state's enforcement of Fla.Stat. § 320.02(1). "There is [a] casual connection between the asserted injury and the conduct being challenged." Allen v. Wright, 468 U.S. 737, 770, 104 S.Ct. 3315, 3334, 82 L.Ed.2d 556 (1984) (noting Simmon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 25, 41, 96 S.Ct. 1917, 1925 48 L.Ed.2d 450 (1976)). We hold that this lawsuit presents a "case or controversy" as required by article III of the United States Constituion and does not constitute a "hypothetical case." Sims and FICA have standing to bring this lawsuit.

B. Preemption

Sims and the FICA successfully challenged the constitutionality of Fla.Stat. § 320.02(9) in the district court. The district court held that the

Clean Air Act and Safety Act preempted the state's authority to require compliance with federal emission and safety standards. Federal preemption of state law is derived from the supremacy clause of article IV, clause 2 of the United States Constitution, which reads as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound therby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Supreme Court in Michigan Canners and Freezers Association, Inc, v. Agricultural Marketing and Bragaining Board, 467 U.S. 461, 104 S.Ct. 2518, 81

L.Ed.2d 399 (1984) stated the three ways in which federal law may preempt state law.

> Federal law may preempt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. [Citation omitted.] Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the states must leave all regulatory activity in thearea to the federal government. [Citations omitted.] Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law.

Michigan Canners, 467 U.S. at 469, 104 S.Ct. at 2523.

In Howard v. Uniroyal, Inc., 719 F.2d 1552, 1555 (11th Cir.1983), we "acknowledge[d] the well established principle that the touchstone of preemption anaysis is congressional intent. . . ." Additionally, "[t]he intent of Congress to pre-empt a state law may be either express

or implied, and 'is compelled whether Congress' command is explicitly contained in its structure and purpose.'" Howard, 719 F.2d at 1556 (citing Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

The Clean Air Act contains the following preemptive provision regarding state enforcement of federal emission standards:

> No state or any political subdivision thereof shall adopt of attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicles engines subject to [the vehicle emission standards of the Clean Air Act]. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or motor vehicle engine as condition precdent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a). The express language in section 7543(a) indicates Congress's intent to exclusively regulate the control

of emissions from new motor vehicles prior to the initial sale. See Michigan Canners, 467 U.S. 461, 104 S.Ct. 2518.

The state contends that Fla.Stat. § 320.02(9) simply ensures that new automobiles coming onto Florida's highways comply with the Clean Air Act; it does not establish new or conflicting emission standards. Although this contention may be based on proper and wholesome intentions, nevertheless, Congress specifically stated that "[n]o state. . . shall adopt or attempt to enforce any [federal or state] standard relating to the control of emissions from new motor vehicles" prior to the initial sale. 42 U.S.C. § 7543(a) (emphasis added). Thus, we agree with the district court's ruling and hold that "[e]nforcement of the Clean Air Act before [the] first sale [of new motor vehicles] is the sole and exclusive prerogative of

the federal government."[10]

The Safety Act likewise contains a preemptive provision which reads in part as follows:

> Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no state or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

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[10] The district court additionally noted that section 7543(d) of the Clean Air Act further indicates Congress's intent to exclusively enforce federal emission standards relating to new automobiles before their initial sale since the statute specifically allows the state to regulate automobile use and operation subsequent to the initial sale. Title 42 U.S.C. § 7543(d) reads as follows: "Nothing in this part shall preclude or deny to any state or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."

The district court held that prior to the first sale of a motor vehicle, "[t]he states are absolutely barred from acting in any manner whatsoever in "enforcing federal safety standards and that" the role of the states in enforcing the federal laws and regulations is confined solely to the period after the first sale of an automobile." We disagree.

Section 1392(d) does not expressly preclude states from requiring proof of compliance with federal safety standards before obtaining title and registration for gray market automobiles. In Hillsborough County, Florida v. Automated Medical Laboratories, Inc. 471 U.S. 707, 714, 105 S.Ct. 2371, 2376 85 L.Ed.2d 714, 722 (1985), the United States Supreme Court stated that "[t]he question whether the regulation of an entire field has been reserved by the federal government is,

essentially, a question of ascertaining the intent underlying the federal scheme." Congess enacted the Motor Vehicle Safety Act to establish uniform federal safety standards. See H.R. 1776, 89th Cong., 2d Sess. 17 (1966), U.S.Code Cong. & Admin.News 1966, p.2709. Section 1392(d), as originally enacted, restricted federal enforcement of safety standards to the initial sale of new vehicles and permitted state enforcement of safety standards identical to corresponding federal standards after the first sale of new vehicles. S.Rep.No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S. Cong.& Admin.News 2709, 2720.

Also, the District Court for the Middle District of Pennsylvania in Truck Safety Equipment Institute v. Kane, 466 F.Supp. 1242 (M.D.Pa.1979), held that state safety standards identical to federal standards

were preempted because the intent of Congress was to preclude states from presale enforcement of federal safety standards. The court in Kane, however, noted that the standards derived under the Pennsylvania system required independent testing and the payment of fees to cover the cost of such testing. Kane, 466 F. Supp. at 1245-46. Unlike the Pennnsylvania regulations examined in Kane, Fla.Stat. § 320.02(9) does not impose additional requirements on the importer of a gray market vehicle than those imposed by the applicable federal standards.

In 1982, the National Highway Traffic Safety Administration (NHTSA) issued an opinion in an attempt to interpret the extent to which section 1392(d) preempted state enforcement of federal safety standards. Federal Motor Vehicle Safety Standards: Interpretation Regarding

Preemption and Presale State Enforcement of Safety Standards, 47 Fed.Reg. 884 (Advisory Letter)(1982). In its interpretation, the NHTSA stated:

> [I]t is the position of the NHTSA that any state requirement which necessitates that manufactureres pay fees in order to obtain approval under a state standard identical to an FMVSS [Federal Motor Vehicle Safety Standard], and any imposition of requirements for approval which has the effect of prescribing the sale of equipment certified under the Act to a standard such as FMVSS 218 would be preempted by operation of the Act and of the agency's action in adopting the federal standard in question.

47 Fed.Reg. at 885.

Recently, the Fifth Circuit in Direct Automobile Importers Association, Inc. v. Townsley, 804 F.2d 1408 (5th Cir.1986), examined a Texas statute similar in language to Fla.Stat. § 320.02(9) and

stated:[11]

> H.B. 1805 places no burden on the manufacturer, which was clearly the concern behind the interpretation. H.B. 1805 does not involve the payment of any fees, nor does it have the effect of prescribing the sale of federally certified equipment. Indeed, H.B. 1805 does not require

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[11] Texas statute, H.B. 1805 provides as follows: Before a motor vehicle not manufactured for sale or distribution in the United States may be registered and titled in Texas, the applicant shall furnish to the designated agent: (1) a bond release letter, with all attachments, issued by the United States Department of Transportation acknowledging receipt of a statement of compliance submitted by the importer of the vehicle and the statement meets the safety requirements of 19 C.F.R. 12.80(e); and (2) a bond release letter, with all attachments, issued by the United States Environmental Protection Agency stating that the vehicle has been tested and shown to be in conformity with federal emission requirements; and (3) a receipt of certificate issued by the United States Department of Treasury showing that any and all gas guzzler taxes due on the vehicle under the provisions of Pub.L. No. 95-618, Title II, Section 201(a) (16 U.S.C.A. 4064) have been fully paid; or (4) proof satisfactory to the agency that the vehicle was not brought into the United States from outside the country.

> any certification except federal certification by federal authorities. As best we can tell, the original pre-1982 amendment provision was enacted to assure uniformity of standards for manufacturers so vehicles and equipment meeting the federal standards could be sold freely in any state. See remarks of Senator Magnuson (one of the NHTSA's sponsors), 112 Cong.Rec. S14230 (daily ed. June 14, 1966) (remarks of Senator Magnuson). The Texas statute H.B. 1805, does not impair this objective since it creates no independent state standard or certification of the automobiles.

Townsley, 804 F.2d at 1414. The same rationale holds true in this case regarding Fla.Stat. § 320.02(9). As noted above, Fla.Stat. § 320.02(9) neither imposes additional requirements or burdens on the manufacturer or importer, nor involves the payment of additonal fees. Additonally, seciton 320.02(9) does not have the effect of prescribing the sale of federally certified equipment, or impairing the objective of Congress in establishing

uniform federal safety standards to permit the free marketability of vehicles in all states.

In 1982, Congress amended section 1392(d) by adding the following sentence to theend of the provision: "Nothing in this section shall be construed as preventing any state from enforcing any safety standard which is identical to a federal safety standard." 15 U.S.C. § 1392(d) (1982). The Senate issued a report on the amendment which reads in part as follows:

> The committee intends that states are not preempted from enforcing safety standards identical to federal standards which they have adopted. States may not require [state] certification or approval of motor vehicles or motor vehicle equipment. However, state enforcement may be carried out according to applicable state laws. States may undertake independent testing, and also may require manufacturers to submit adequate test data concurrent with the first sale or thereafter.

S.Rep. No. 505, 97th Cong., 2d Sess. 6,

reprinted in 1982 U.S. Code Cong. & Admin.News 3169, 3174.

In Georgia Automobile Importers Compliance Association, Inc. v. Bowers, 639 F. Supp. 352 (1986), the District Court for the Northern District of Georgia addressed the constitutionality of Georgia statutes O.C.G.A. §§ 40-2-25.1[12],

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[12] Section 40-2-25.1 provides that:

> (a) No application shall be accepted and no certificate of registration shall be issued to any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by . . . the 'Clean Air Act,'...and as required by the 'National Traffic and Motor Safety Act,'...unless and until the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency have certified that the motor vehicle complies with such applicable federal standards and unless all documents required by the Department of Revenue for processing an application for a certificate of registration or title are printed and filled out in the English

40-3-29.1[13],

(footnote con't)

language or are accompanied by an English translation.

O.C.G.A. § 40-2-15.1(a)(1985).

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[13] Section 40-3-29.1 states that:

> [N]o application shall be accepted and no certificate of title shall be issued to any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by ... the 'Clean Air Act'...and as required by the 'National Traffic and Motor Safety Act,'... unless and until the United States Customs Service or the United States Department of Transportation and the United States Environment Protection Agency have certified that the motor vehicle complies with such applicable federal standards and unless all documents required by the Department of Revenue for processing an application for a certificate of registration or title are printed and filled out in the English language or are accompanied by an English translation.

and 16-9-110[14] (1985) in light of 15 U.S.C. § 1392(d) (1982). In reviewing the legislative history of section 1392(d), the district court noted several statements made on the floor of the House of Representatives when the bill was passed indicating congressional intent. Representative Wirth stated that "[a]

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[14] Section 16-9-110 provides that:

> (a) It shall be unlawful for any person, firm, or corporation knowingly to sell, transfer, or otherwise convey any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by ... the 'Clean Air Act,'... and the 'National Traffic and Motor Safety Act,'...unless and until the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency have certified the motor vehicle complies with such applicable federal standards.

O.C.G.A. § 16-9-110(a) (Supp.1985).

recent court case and NHTSA opinion have changed the scope of traditional state enforcement." 128 Cong. Rec. H3438 (daily ed. June 14, 1982) (remarks by Rep. Wirth). Representative Moorhead considered the amendment of affirmatively declare states as having a role in enforcing federal safety standards. See 128 Cong.Rec. H3439 (daily ed. June 14, 1982)(remarks of Rep. Moorhead). In addition, Representative Dingell stated in regard to section 1392(d), as amended, that "states may undertake independent testing of vehicles or equipment and may require manufacturers to submit adequate data concurrently with the first sale within a state, or thereafter." 128 Cong.Rec. H3440 (daily ed. June 14, 1982) (remarks of Rep. Dingell).

We agree with the court's conclusion in Townsley that "the legislative history

shows an intent to preempt state presale enforcement of federal standards where the sale of federally certified equipment is impaired by an independent state compliance system." Townsley, 804 F.2d at 1415. Fla.Stat. § 320.02(9) does not create an impairment to the enforcement of federal safety standards or frustrate the intent of Congress in establishing uniformity of standards for manufacturers of vehicles; consequently, we hold that 15 U.S.C. § 1392(d)(1982) does not preempt Fla.Stat.§ 320.02(9)(1985).

C. Commerce Clause

The district court concluded that since Fla.Stat. 320.02(9) prevents owners of gray market vehicles from titling and registering their vehicles prior to presenting proof of compliance with federal emission and safety standards, the marketability of gray market vehicles is

limited and prevents their free introduction into the stream of commerce.

The commerce clause of the United States Constituion reads in part as follows: "The Congress shall have the power to regulate commerce with foreign nations, and among the several states...." U.S. Const. art I, § 8,s cl.3. In determining whether Fla.Stat. § 320.02(9) is violative of the commerce clause, we must (1) determine exactly what interest the statute purports to protect, (2) determine whether the statute burdens commerce, and if so, to what extent, and (3) balance the weight and nature of the interest protected by the statute against the extent to which it imposes a burden on commerce. See generally Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 1-1 S.Ct. 1309, 67 L.Ed.2d 580 (1981).

In addressing the extent to which states

may create laws affecting commerce, the Supreme Court has held that:

> The commerce clause does not ... invalidate all state restrictions on commerce. It has long been recognized that , 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.' [Citation omitted.] The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a state's power to regulate commerce is never greater than in matters traditionally of local concern. [Citation omitted.] For example, regulations that touch upon safety--especially highway safety--are those that 'the Court has been most reluctant to invalidate.' [Citations omitted.] Indeed, 'if safety justifications are not illusory, the Court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce.' [Citation omitted.] Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity.' [Citation omitted].

Kassel, 450 U.S. at 669-70, 101 S.Ct. at 1315-16.

The objective of Fla.Stat. § 320.02(9) is to ensure that gray market vehicles comply with federal emission and safety standards before receiving titles and registration in Florida. Fla.Stat. § 320.02(9) advances a legitimate and local concern for the health and safety of the state's citizens in that it attempts to prevent the sale and operation of vehicles in Florida that are not considered safe for persons and the environment under federal standards.

We must now determine the extent to which Fla.Stat. § 320.02(9) burdens commerce. Section 320.02(9) imposes restrictions on the importation of gray market vehicles into the United States. We agree with the district court that:

> The statute prevents the tiling and registration of vehicles which in turn limits the marketability of the cars. To force an importer to use a different port of entry, for example,

> Savannah, Georgia, or Mobile, Alabama, in order to receive registration and titles from the relevant state authorities without having to endure the trials and tribulations that Florida has erected in their path destroys the common market of commerce for the entire United States as established by the Constitution. It is precisely this type of state action that he Commerce Clause was designed to prevent; thus the statute is constitutionally infirm.

Accordingly, in weighing the local concerns of section 320.02(9) against the burden on commerce, we find that the Fla.Stat.§ 320.02(9) does violate the commerce clause. Although Fla.Stat. § 320.02(9) requires no greater compliance than compliance with applicable federal standards, Florida's titling and registration statute imposes a burden on foreign and interstate commerce. The Florida Statute directs the stream of commerce in gray market vehicles from Florida to other states for those owners

who have legitimate reasons for registering and titling their vehicles before being able to use them on the roads in Florida.

D. Immunity

Sims and the FICA filed suit in the district court against the State of Florida, Department of Highway Safety and Motor Vehicles, and the Attorney General seeking to enjoin the enforcement of Fla.Stat. § 320.02(9). Thereafter, Sims and the FICA filed a motion (which was not contested) to dismiss the Attorney General as a defendant in the case. The Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles, was never included as a party defendants. Thus, the only remaining party defendants in the present action are the State of Florida and one of its agencies--the Department of Highway Safety and Motor

Vehicles. "It is clear ... that in the absence of consent a suit in which the state or one of its agencies or departments is named as the defendant is prescribed by the eleventh amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

The state of Florida, in responding to the constitutional challenge to Fla.Stat. § 320.02(9), failed to plead the defense of sovereign immunity under the eleventh amendment and did not initially raise the issue on appeal. Nonetheless, "[T]he eleventh amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974). Moreover, Florida's constitution requires "specific, clear, and

unambiguous language in a statute to constitute a waiver of sovereign immunity." Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla.1978) In our review of Florida law, we have found no legislative enactment waiving the state's sovereign immunity under the facts and issues in this case.

The state of Florida asserted the defense of sovereign immunity in this case only after this court requested that the parties brief the issue. Sims and the FICA contend that this court unwarrantedly raised the eleventh amendment defense, citing Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 515 n. 19, 102 S.CT. 2557, 2567 n. 19, 73 L.Ed.2d 172 (1982): "[W]e have never held that [the eleventh amendment defense] is jurisdictional in the sense that it must be raised and decided by this court on its own

motion." Although we do not interpret Patsy as prohibiting this court from raising the issue of sovereign immunity, we do recognize the inequity in allowing the state to now assert the defense of sovereign immunity without affording Sims and the FICA an opportunity to effectively counter the defense at this stage in the litigation. [15] After reviewing Florida law on sovereign immunity and the procedural position in which the parties are caught we remand (as we did in Patsy) this issue to the district court to determine whether Sims and the FICA should be granted leave

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[15] Sims and the FICA moved this court to allow the addition of Charles J. Brantly as a party defendant, or in the alternative, to temporarily relinquish jurisdiction to the district court so that they might seek to add Brantly as a party defendant. The matters to be weighed in ruling on such a motion can better be considered in the district court.

to add an appropriate party in light of the state's untimely and compelled assertion of the sovereign immunity defense.

E. Mootness

Amicus curiae Mercedes Benz of North America, Incorporated, raised the issue of mootness in this case because Myra Sims has now received final admission of her automobile. The FICA remains a party to the present action with a continuing interest in the outcome. Moreover, the state concedes that Sims and the FICA's claim is not moot: "The issue ... is one that is capable of repetition yet evading review." We agree with this conclusion and accordingly hold that the present action is not moot.

CONCLUSION

In summary, we affirm the district court's finding that Fla.Stat. § 320.02(9) violates the Clean Air Act, 42 U.S.C. § 7522 because Congress has reserved to thefederal government the sole and exclusive prerogrative of enforcing federal emission standards. We also affirm the district court's ruling that Fla.Stat. § 320.02(9) violates the commerce clause, U.S. Const. art. I, § 8, cl. 3. Also, we remand to the district court the sole issue of whether Sims and the FICA should be granted leave to add an additional party or parties in this case. Accordingly, we affirm in part and remand for further proceedings consistent with this opinion.

AFFIRMED in part and REMANDED

TJOFLAT, Circuit Judge, dissenting:

I.

A "gray market" automobile is an automobile manufactured fo use outside the United States, and is generally not designed and built to comply with federal emission and safety standards. Purchasers buy these automobiles overseas, import them into the United States, and modify or convert them to ccmply with federal emission and safety standards.

In 1984, the Florida legislature passed the following law concerning automobile titling and registration:

> Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and tiled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United Staes Environmental Protection Agency to be in compliance with these federal standards. A vehicle which is

> registered pursuant to this subsection shall not be titled as a new motor vehicle.

Fla.Stat. § 320.02(9) (Supp. 1978) (enacted prior to amendment as Act approved June 11, 1984, ch. 84-155, § 3, 1984 Fla.Laws 457,458). This provision prevents the owner of a gray market automobile from acquiring title and vehicle registration in Florida until he obtians the required documentation from the federal government.

The appellees in this action are the Florida Import and Compliance Association (FICA) and Myra Holladay Sims. FICA is a trade association whose members are directly involved in various aspects of the importation of gray market automobiles. Sims, the owner and importer of a gray market automobile, sought unsuccessfully to title and register her automobile in Florida. Officials from the Florida Department of Highway Safety and Motor

Vehicles refused to title and register Sims' automobile because she did not produce proof of compliance with section 320.02(9). Appelles subsequently brought suit in Federal district court against the Florida Department of Highway Safety and Motor Vehicles,[1] claiming the State's enforcement of section 320.02(9) violated

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[1] The Attorney General of the State of Florida, Jim Smith, was also named as a defendant in the complaint, but the district court entered an order on August 29, 1985 droping him as a party, pursuant to appellees' unopposed motion.

the supremacy and commerce clauses[2] of the United States Constitution because (1) the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1982) (the Safety Act), preempted the State's authority to require compliance with federal emission and safety standards; and (2) enforcement of section

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[2] The supremacy cluase provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
> U.S. Const. art. VI, cl. 2.

The commerce clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3.

320.02(9) places an impermissible burden on foreign and interstate commerce. Appellees asked the court to declare section 320.02(9) unconstituional and to enjoin its enforcement.

After a bench trial, the district court concluded that the Clean Air Act and the Safety Act preempted the State's authority to enforce Fla.Stat. § 320.02(9), and that such enforcement would violate the commerce clause. The court therefore granted appellees' application for a permanent injunction, and enjoined the State from enforcing its statute. The State now appeals from the district court's rulings.

The majority holds that both Sims and FICA have standing to challenge Fla.Stat § 320.02(9), ante at 1563-64, and that neither party's cause of action is moot. Ante at 1570. The majority reaches the merits of dispute and holds that the

Florida Statute is preempted by the Clean Air Act, ante at 1564-65, but not the Safety Act, ante at 1565-68, and that the Florida statute violates the commerce clause. Ante at 1568-69. The majority, however, remands the case for further findsings regarding the State of Florida's eleventh amendment defense. Ante at 1569-70.

Because I believe that both Sims and FICA lack standing to challenge the Florida statute, I respectfully dissent. I also believe that Sims' cause of action is moot and no longer reviewable. Because of appellees mootness and standing problems, I should decline to address the merits of their claims. Nonetheless, I am compelled to respond to the majority's conclusion that section 320.02(9) violates the commerce clause. The majority unduly limits the power of the states to regulate

commerce[3] I begin with a discussion of appellees' lack of standing.

II.

A.

Although the State of Florida did not challenge appellees' standing in the district court,[4] we are obliged to examine this issue sua sponte because the jurisdiction of this court and the district court must be founded on the existence of a "case or controversy" under article III of the Constituion. See Juidice v. Vail, 430 U.S. 327 331, 97 S. Ct. 1211, 1215, 51

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[3] In light of my conclusion that appellees lack standing, I do not address whether the State of Florida has waived its eleventh amendment, sovereign-immunity defense.

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[4] The standing issue was first addressed by amicus curiae Mercedes-Benz of North America, Inc. in its brief before this court.

L.Ed.2d 376 (1977) ("Although raised by neither of the parties, we are first obligated to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in theDistrict Court."); Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) ("In its constitutional dimension, standing . . . is the threshold question in every federal case, determining the power of the court to entertain the suit.").

"Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted. "Warth,422 U.S. at 500, 95 S. Ct. at 2206(citation omitted). In this case, the statutory schemes of both the Clean Air Act and the Safety Act, as well

as the special importation regulations applicable to gray market automobiles, must be examined to determine the nature of the injury, if any, appellees have suffered as a result of the enactment of Fla.Stat. § 320.02(9).

B.

The Clean Air Act authorizes the Environmental Protection Agency (EPA) to regulate and establish standards applicable to the emission of any air pollutant from motor vehicles. 42 U.S.C. § 7521(a) (1982). The Clean Air Act also prescribes specific standards applicable to the emission of carbon monoxide, hydrocarbons, and oxides of nitrogen. See, e.g., Id. §§ 7521(a)(3)(A)(ii), 7521(b)(6)(A). These standards must be implemented when the EPA administrator determines that they are technologically feasible, "giving

appropriate consideration ot the cost of compliance." Id. § 7521(a)(2).

To enforce the scheme of federal regulation mandated by the Clean Air Act, Congress directed the EPA to test or require the testing of any new motor

vehicle[5] submitted by a manufacturer, to determine whether the vehicle conforms with

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[5] For purposes of the Clean Air Act provisions, the term "new motor vehicle" is defined as follows:

> Except with respect to vehicles or engines imported or offered for importation, the term "new motor vehicle" means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term "new motor vehicle engine" means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser; and with respect to imported vehicles or engines, such terms means a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States).

42 U.S.C. § 7550(3) (1982). Thus, the term "new motor vehicle" includes the category of post-Clean Air Act automobiles imported into the United States, whether they are in fact new or pre-owned.

section 7521 and the regulations promulgated under that section. Id. § 7525(a)(1). If the prototype vehicle complies with the applicable emission standards, the EPA must issue to the manufacturer a "certificate of conformity" that covers the class of motor vehicles represented by the prototype. Id. § 7525(a). Section 7525(b) authorizes the EPA to develop testing procedures to assess whether the manufacturer has designed and produced a motor vehicle that is in actual compliance with governing emission standards. The certificate of conformity is a condition precedent to the initial retail sale of any new motor vehicle because a manufacturer is prohibited from selling, importing, or otherwise introducing into commerce a vehicle that is not covered by such a certificate. Id. § 7522(a)(1).

By enacting these provisions, Congress made a deliberate policy choice concerning the enforcement of federal emission standards. Congress did not provide, for example, for the testing of every new motor vehicle produced for use in the United States. Rather, it authorized the EPA to issue a certificate of conformity to manufacturers whose prototype vehicle complies with the emission standards. Under section 7541, the manufacturer is then required to warrant to the consumer that its motor vehicle is designed, built, and equipped to comply with the applicable emission standards. Id. § 7541(a).

Congress recognized, however that some of the automobiles operated in the United States are gray market automobiles manufactured for sale and use abroad and were not designed to comply with American emission standards. Accordingly, the Clean

Air Act bars the importation of motor vehicles that do not comply with applicable federal emission standards. See 42 U.S.C. § 7522(a)(1982) (prohibiting "importation into the United States" of motor vehicles not in compliance with the Clean Air Act); id. § 7522(b)(2)("A new motor vehicle ...offerred for importation or imported by any person in violation of [section 7522(a)] shall be refused admission into the United States..."). The EPA has provided a limite exemption from the requirements of the Clean Air Act's emission standards, provided that the vehicle is more than five years old, is imported for personal use and not for resale, and will not be sold within two years after importation. United States EPA, Automotive Imports--Fact Sheet 76 (1983).

In enacting this comprehensive scheme

for federal regulation of motor vehicle emission, Congress believed that national standards were necessary to permit manufacturers to obtain economies of scale in the design and production of automobiles, and to prevent the application and administration of emission standards for "new motor vehicles" by each ofthe fifty states. See H.R.Rep. No. 728, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Admin. News 1938, 1955-58. Accordingly, Congress passed thefollowing provision to preempt state emission regulations:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to [the vehicle emission standards of the Clean Air Act]. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale,

titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a).[6] Nonetheless,

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[6] The EPA is authorized to waive application of the preemption provison in certian limited circumstances:

> The Administrator of [the EPA] shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that-
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> (A) the determination of the State is arbitrary and capicious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
>
> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

42 U.S.C. § 7543(b)(1)(1982). Only the state of California has sought and obtained waiver of preemption under the Clean Air Act.

"[n]othing in [the vehicle emission standards of the Clean Air Act] shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Id. § 7543(d).

C.

In 1966, Congress enacted the Safety Act "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381 (1982). To achieve this purpose, Congress directed the Secretary of Transportation, through the National Highway Traffic Safety Administration (NHTSA), to establish federal motor vehicle safety standards. Id. § 1392(a); see 49 C.F.R. § 501.2 (1986). After consideration of relevant motor vehicle safety data, the NHTSA is

authorized to issue safety standards that take into account the reasonableness, practicability, and appropriateness of the standards, and the extent to which the standards further the purposes of the Safety Act. 15 U.S.C. § 1392(f)(1982). The NHTSA has promulgated standards for a variety of vehicle features, such as bumpers, doors, windshields, and seat belts.

The Safety Act provides for a self-certification procedures, under which every motor vehicle manufacturer or distributor must furnish to dealers and distributors a certification that each of its motor vehicles conforms to all applicable federal motor vehicle safety standards. Id. § 1403. The Act prohibits the sale, offer for sale, manufacture for sale, or importation into the United States of any motor vehicle manufactured after the

effective date of an applicable motor vehicle safety standards unless the vehicle conforms with the safety standard.[7] Id. § 1397(b)(3). In contrast to the Clean Air Act, the Safety Act has no once-in-a-lifetime exemption for automobiles imported for personal use. See generally United States EPA, Automotive Imports--Fact Sheet 76 (1983).

Like the Clean Air Act, the Safety Act contains a preemption provision, which provides as follows:

> Whenever a Federal Motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either

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[7] This prohibition does not apply "to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale." 15 U.S.C. § 1397(b)(1)(1982).

> to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with otherwise applicable Federal standard.

Id. § 1392(d).

D.

Despite its general prohibition against the importation of nonconforming motor vehicles into the United States, Congress has authorized the importation of gray market automobiles upon the furnishing of a bond or other means of assuring that federal environmental and safety laws are

not circumvented unlawfully.[8] The EPA, the

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[8] Under the Clean Air Act,

> the Secretary of the Treasury and the Administrator [of the EPA] may, by joint regulation, provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admision under this paragraph, cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice such refusal or such additional time as may be permitted pursuant to such regulations, except tha disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new motor vehicle or new motor vehicle engine that fails to comply

Department of Transportation (DOT), and the Treasury Department have promulgated regulations governing the importation of motor vehicles that do not comply with the

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(footnote con't)

> with applicable standards of the Administration under this part.

42 U.S.C. § 7522(b)(2)(1982).

> Similarly, the Safety Act provides as follows:
> [T]he Secretary of the Treasury and the Secretary [of the DOT] may, by ...the regulations, provide for authorizing the importation of such motor vehicle or item or motor vehicle equipment into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicalbe Federal motor vehicle safety standard prescribed under this subchapter, or will be exported or abandoned to the United States.

15 U.S.C. § 1397(b)(3) (1982).

Clean Air Act and the Safety Act.[9] Under these regulations, a noncomplying automobile is conditionally admitted into

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[9] During this appeal, the EPA substantially overhauled its regulations concerning the importation of gray market automobiles. See generally Notice of Final Rule-Making, 52 Fed.Reg. 36,-136 (1987) (to be codified at 40 C.F.R. § 85.1501). The new regulations, effective July 1, 1988, eliminate the once-in-a-lifetime exemption for vehicles greater than five years old, limit most importing activity to independent certified importers (ICI's), after the testing and modification requirements, and impose a 15-day holding period on imported vehicles. Accordingly, many of the regulations discussed in the opinion will no longer apply after July 1, 1988.

On September 29, 1987, amicus curiae Mercedes-Benz of North America filed with this court a supplemental brief arguing tha the EPA's change in regulations rendered this dispute moot. With respect to appellee Sims, the new regulations will have no effect. Nor does the EPA action, by itself, render this dispute moot with respect to FICA's claim for declaratory judgment. Even if FICA is unable to obtain certificates for importation and is therefore unable to import after July 1, 1988, it is still entitled to import vehicles under the current regulations until that date.

the United States for the limited purpose of enabling the importer to comply with federal emission and safety laws.[10] The importer of record must post an entry bond with the United States Customs Service (Customs) equal to the value of the vehicle plus the customs duty. See Automobile Importers Compliance Ass'n, Handbook of Vehicle Importation 21 (1984) [hereinafter AICA Handbook]. In addition, the importer must sign a statement indicating that the motor vehicle "is not covered by a certificate of conformity with federal motor vehicle emission standards but will

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[10] An importer can also bring a noncomplying automobile into the United States by meeting one of the other available exceptions to the compliance requirements of the Clean Air Act and Safety Act. See, e.g., 19 C.F.R. §§ 12.-73(b)(5)(i)-(ix); 12.80 (b)(1)(i), (ii), (iv)-(ix), (b)(2), (f)(1987). These exceptions are not relevant to the case before us.

be brought into conformity with such standards." 19 C.F.R. § 1273(b)(5)(x) (1987). Finally, the importer must declare that the automobile "was not manufactured in conformity [with] all applicable safety standards, but it has been or will be brough into conformity." Id. § 12.80(b)(iii). The entry bond requirement serves to enforce the importer's obligations to comply with the requirements of federal emission and safety standards. Thus, Customs will not release the bond until it receives assurances from the EPA and the NHTSA that the importer has complied with the standards. See Id. §§ 12.73(c), 12.80(e).

Once the automobile has been conditonally admitted into the United States by Customs, it is released into the custody of the importer. The conditions of this release are crucial to the

determination of appelles' standing in this case. Under EPA regulations, an automobile conditionally admitted into the United States "shall be stored and shall not be operated on the public highways or sold until such vehicle or engine has been granted final admission." 40 C.F.R. § 85.1507 (1986)(emphasis added); see also Georgia Auto. Importers Compliance Ass'n v. Bowers, 639 F.Supp. 352, 354 n. 2 (N.D.Ga.1986) (order granting preliminary injunction) ("EPA regulations state that a nonconforming vehicle conditionally admitted must be stored and must not be sold or operated on the public highways until the vehicle has been granted final admission.") (citation omitted); Direct Auto. Imports Ass'n v. Townsley, No. H-85-3610 (S.D.Tex. Oct. 18, 1985) [Available on WESTLAW, DCT database] ("[T]he EPA specifically requires [that] the vehicle

...must not be operated on the highways except for purposes of modification and testing until the bonds are released.")(citation omitted), rev'd in part on other grounds, 804 F2d 1408 (5th Cir. 1986); AICA Handbook, supra, at 22 ("It is important to note that the only reason the vehicle has been released is to permit modifications necessary to bring the vehicle into compliance with emission and safety stnadards. The vehicle is not to be used on the streets and highways, except for delivery to the modifier....").[11] The term "final admission," as used in the EPA regulations, refers to the unconditional admission of the vehicle into the United

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[11] EPA regulations also prohibit the storage of a noncomplying automobile on the premises of, or subject to access or control by, any automobile dealer. 40 C.F.R. § 85.1504 (1986).

States and the release of the entry bond by Customs, which occurs after the EPA and the NHTSA assure Customs that the vehicle complies with each agency's regulations. See AICA Handbook supra, at 8, 10, 18, 26 (final admission occurs after Customs receives bond release letters from the EPA and NHTSA and the duty is liquidated). Thus, until the importer has completed the compliance process prescribed by the EPA, he is prohibited by EPA regulations from operating or selling the imported autombile.

Under DOT regulations, an automobile conditionally admitted into the United States may not be sold or offered for sale until NHTSA assures Customs that the vehicle has been "brought into conformity with all applicable safety regulations." 19 C.F.R. § 12.80(b)(1)(iii) (1987). The DOT regulations are silent with regard to

whether it is permissible to operate the imported automobile prior to final admission.

In order to obtian release of the entry bond and final admission of the vehicle by Customs, the importer must satisfy the rquirements of both the EPA and the NHTSA. Within five days of conditional admission of the vehicle, the importer or consignee of the vehicle must submit to the EPA a written request for permission to modify the vehicle so that it will conform

with applicable emission standards.[12] 40

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[12] The importer's written request must contain the following:

> (1) A statement, acceptable to the Administrator [of the EPA], that specifies the modifications which are necessary to render the vehicle or engine in conformity with a test vehicle or engine for which a certificate of conformity has been issued; or, if the vehicle or engine cannot be modified to bring it within a class of vehicles or engines represented by a tst vehicle or engines represented by a test vehicle or engine for which a certificate of conformity has been issued, the request shall state that the importer or consignee will demonstrate that the vehicle or engine is in conformity with applicable emission standards or family particulate emission limits, as defined in [40 C.F.R. Part 86 (1984)] by testing the vehicle or engine or causing it to be tested in accordance with the test procedures prescribed under section 206 of the Act in effect during (and applicable to) the model year of such vehicle.
>
> (2) The date by which the modifications will be accomplished;
>
> (3) Identification of the place where the vehile or engine will be stored pending a determination of conformity under this paragraph.

C.F.R. § 85.1504(a)(1986). The EPA then sends the importer a "Dear Importer" letter, which informs his of the methods by which he can comply with the requirements of the EPA's import regulations. If the importer cannot utilize the one-time exemption granted by the EPA, he must demonstrate through modification and

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> Provided, that such vehile or engine shall not be stored on the premises of, or subject to access by or control of any dealer;
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> (4) An acknowledgement of responsiblity for the custody of the vehicle or engine while the modifications are being made and while a determination of conformity is pending; [and]
>
> (5) Authorization for representatives of the Environmental Protection Agency to inspect or test the vehicle or engine at any reasonable time for the purpose of making a determination of conformity....

40 C.F.R. § 85.1504(a) (1986).

testing of the vehicle that it complies with applicable Clean Air Act standards. Once the EPA is satisfied that the vehicle is exempt or is in actual compliance, it will send to Customs a bond release letter, which informs Customs that the emission regulations have been satisfied.

The importer must also comply with the requirements of the Safety Act and the regulations issued by the DOT. Within 120 days of conditional admission of the vehicle into the United States, or within 180 days of the NHTSA grants a sixty-day extension, the importer or consignee must submit to the NHTSA a statement containing the following: (1) the identify of the person who brought the vehicle into conformity with the Safety Act; (2) the exact nature and extent of the modifications performed; (3) certification that the vehicle complies with the Safety

Act; and (4) certification that he vehicle will not be sold or offered for sale until the NHTSA "issues an approval letter tot he district director [of Customs] stating tht the vehicle ... has been brought into conformity with all applicable safety standards." 19 C.F.R. § 12.80(b)(1)(iii)(1987). Once the NHTSA is satisfied that the vehicle is in actual compliance with the Safety Act, it sends a bond release letter to Customs.

When Customs receives a bond release letter from both the EPA and the NHTSA, it grants final admission for the vehicle, completing the importation process. At that point, and not before, the importer is permitted to operate the vehicle and, unless he is importing the vehicle under his one-time exemption from the Clean Airt Act, to sell the vehicle. An importer who fails to comply with EPA and DOT import

regulations may be subjected to a number of penalties. Customs can require that he forfeit the entry bond, 19 C.F.R. §§ 12.-73(c), 12.80(e), 113.62(i)(1)(1987), export the noncomplying vehicle, or return it to Customs for dispositon, id. § 12.73(e), 12.80(e). In addition, the importer may be liable for a fine of up to $10,000.

III.

Having determined the rights and obligations of importers of gray market automobiles, I now examine whether appellees have such a personal stake in the outcome of this controversy to have standing to challenge Florida's requirement that these automobiles be certified by the EPA and the DOT prior to titling and registration. The constitutional requirement of standing has four elements. First the plaintiff must show

that he has suffered actual or threatened injury caused by the allegedly illeagal conduct of the defendant. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91,99,99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). Second, the plaintiff's injury must be fairly traceable to the challenged action. Id. (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26,38,41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)). Third, the injury must be "likely to be redressed by a favorable decision." Id. (quoting Simon, 426 U.S. at 38, 96 S.Ct. at 1924). Finally, the injury must be judicially cognizable. See Allen v. Wright, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed. 3d 556 (1984) ("Is the

injury too abstract, or otherwise not appropriate, to be considered judically cognizable?"); see also Valley Forge, 454 U.S. at 472-74, 102 S.Ct. at 758-59.

Even if a plaintiff meets the constitutional requirements for standing, we must determine whether prudential limits on the exercise of federal jurisdiction should prevent his claim from going forward. Allen 468 U.S. at 751, 104 S.Ct. at 3324; Valley Forge, 454 U.S. at 474-75, 102 S. Ct. at 760. For example, the plaintiff should normally assert his own legal rights and interest not the rights of third parties. Id. at 474, 102 S.Ct. at 760 (citing Warth, 422 U.S. at 499, 95 S.Ct. at 2205). In addition, the federal courts should refrain from adjudicating generalized grievances that present "abstract questions of wide public significance." Id. at 475, 102 S.Ct. at

760 (quoting Warth, 422 U.S. at 500, 95 S.Ct. at 2206). "Finally, the [Supreme] Court has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Id. (quoting Association of Data Processing Serv. Orgs., Inv. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)).

In the present case, appellees must show a judically cognizable injury traceable to the Florida title and registration statute, which is likely to be redressed by a holding that the Florida statute is preempted or violates the commerce clause. The majority contends that appellees met these constitutional requirements and have standing to challenge the Florida law requiring proof of compliance with federal safety and emission

standards. I disagree with this conclusion because I fail to see how appellees have been injured by the enactment of the Florida statute. Accordingly, I would find that neither Sims nor FICA has standing, under either the Clean Air Act or the Safety Act, to challenge the Florida statute.

The sole injury allegedly suffered by appellee Sims nad the individual members of the appellee FICA is their inability to title and register gray market automobiles before final admission. This fails to constitute a cognizable injury, however, because the only purpose for which title and registration is sought is to enable the owner to drive or sell the vehicle, and these activities are prohibited by federal law until the vehicle is granted final admission.

Under Florida law, a certificate of title is necessary for the sale and operation of a motor vehicle within the state. Fla.Stat. §§ 319.21, 319.34 (Supp.1987).[13] With regard to vehicle

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[13] Fla.Stat.§ 319.21 (Supp.1987) provides in relelvant part as follows:

> (1) No manufacturer, distributor, licensed dealer, or other person shall sell or otherwise dispose of a new motor vehicle or a new mobile home to a distributor, licensed dealer or other person without delivering to such distributor, licensed dealer, or other person a manufacturer's statement of origin duly executed and with such assignments thereon as may be necessary to show tile in the purchaser thereof, on forms approved by the department; nor shall any distributor, licensed dealer, or other person purchase, acquire, or bring into thestate, except for temporary use and not for sale, a new motor vehicle or a new mobile home without obtaining from the seller thereof the manufacturer's statement of origin....
>
> (2) No person shall sell or otherwise dispose of a motor vehicle or mobile home without delivering to

registration, Florida law provides that

(footnote con't)

> the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser. No person shall purchase or otherwise acquire or bring into the state a motor vehicle or mobile home, except for temporary use, unless such person obtains a certificate of tile for it in his name in accordance with the provisions of this chapter. However, any licensed dealer may, in lieu of having a certificate of title issued in his name, reassign any existing certificate of tile isued in this state. If no certificate of title exists on a motor vehicle or mobile home in this state and if the vehicle is not a new motor vehicle or a new mobile home requiring a manufacturer's statement of origin under the provisions of this seciton, the dealer shall, over his signature, briefly note the fact of nonexistence of a certificate of title and show the name and address of the party from whom the vehicle or mobile home was obtained on the face of the separate application for intial certificate of title which is made by the purchaser or transferee. It shall not be necessary for any licensed dealer to obtian a

"every owner or person in charge of a motor

(footnote con't)

> certificate of title on any new motor vehicle or new mobile home which he is selling or which he acquires for sale if he obtains a manufacturer's statement of origin as provided in subsection (1); however, the dealer shall attach the manufacturer's statement of origin to the separate application for initial certificate of title which is made by purchaser and certify on the face of such application that the vehicle is a new motor vehicle or new mobile home and shall also disclose the name and address of the manufacturer, distributor, or other person from whom he acquired such motor vehicle or mobile home.

Fla.Stat. § 319.34 (Supp. 1987) provides as follows:

> Whoever, except as otherwise provided for in this chapter, purports to sell or transfer a motor vehicle or mobile home without delivering to the purchaser or transferee thereof a certificate of title therto duly assigned to such purchaser as provided in this chapter or operates or uses in this state a motor vehicle or mobile home for which a certificate of title is required without such certificate

vehicle which is operated or driven on the roads of the state shall register the vehicle in this state." Fla.Stat. § 320.02(1) (Supp.1987). Moreover, "[n]o registration is required for any motor

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> having been obtained in accordance with the provisions of chapter, or upon which the certificate of title has been canceled; whoever fails to surrender any certificate of title, certificate of registration, license plate, or sticker upon cancellation of the same by the department and notice thereof as prescribed in the chapter; whoever fails to surrender the certificate of title to the department as provided in this chapter in case of the destruction or dismantling or change of a motor vehicle or mobile home in such respect that it is not the motor vehicle or mobile home described in the certificate of title; or whoever violates any of the other provisions of this chapter, or any lawful rule adopted pursuant to the provisions of this chapter, shall be fined not more than $500 or imprisoned for not more than 6 months, or both, for each offense.

vehicle which is not operated on the roads of this state during the registration period." Id. Thus, the sole purpose of vehicle registration is to permit the operation of automobiles on Florida's roads.

I fail to understand how the majority can conclude that appellees have been "injured" by the enactment of the Florida statute. Under EPA regulations, appellees have no right to operate or sell the vehicle under the provisions of the Clean Air Act and the Safety Act are met and Customs grants final admission. As I noted in my description of the automobile importation process, a gray market automobile is granted conditional admission into the United States solely for the purpose of modification of its emission and safety features. Customs will grant the vehicle final admission only when it

receives assurances from the EPA and the NHTSA that the vehicle complies with federal emission and safety standards. Until the vehicle is granted final admission, the EPA requires that the automobile "shall be stored and shall not be operated on the public highways." 40 C.F.R. § 85.1507 (1986). Moreover, EPA regulations prohibit the sale of the vehicle prior to final admission. Id.

As I stated above, the sole purpose of titling and registration of a vehicle in Florida is to permit the sale and operation of the vehicle on Florida's roads. The Florida statute simply prevents titling and registration, i.e., the sale or operation of a vehicle, until federal emissions standards are met. In effect, the Florida statute challenged by appellees does nothing more than prohibit what is already prohibited under the Clean Air Act.

Therefore, I cannot agree that appellees have been "injured" by the Florida statute.

Appellees were not "injured" with respect to the Safety Act's povisions, either. The majority, in its conclusion that the Florida statute is not preempted by the Safety Act, finds that the Florida statute does nothing more than enforce the requirements of the Safety Act. Ante at 1567 ("Fla.Stat. § 320.02(9)...imposes [no] additional requirements or burdens on the manufacturer or importer [than those already imposed by the Safety Act]."). This conclusion--that appellees are "injured" by a Florida statute which, as the majority admits, goes no farther in restricting appellees' conduct than does the Safety Act--perplexes me.

I also believe that the mere inability to obtain the tile and registration documents themselves is too speculative a

ground on which to base appellees standing. Cf. Allen v. Wright, 468 U.S. 737, 753-56, 104 S.Ct. 3315, 3326-27, 82 L.Ed.2d 556 (1984) (parents seeking to challenge failure of Internal Revenue Service to deny tax-exempt status to racially discriminatory private school lacked standing because they failed to allege harm involving a concrete, personal right); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc. 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982) (plaintiffs lacked standing because "they failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with whch one disagrees"); Warth v. Seldin, 422 U.S. 490, 507-08, 95 S.Ct. 2197, 2209-10,

45 L.Ed.2d 343 (1975) (plaintiffs seeking to challenge exclusionary zoning practices lacking standing because they failed to allege "specific, concrete facts demonstrating that the challenged practices harm [them] personally would benfit in a tangible way from the court's intervention") (emphasis added).

The majority nevertheless asserts that appellees are sufficiently "injured" by their inability to get the title and registration documents themselves. Ante at 1563-64. The majority then speculates that "[a] positive alternative need the owner of a gray maket vehicle may have for a certificate of title is the securing of bank financing to assist in the purchasing of the automobile." Ante at 1564 n. 9. This assertion is insufficient to create standing, for two reasons.

First, any such injury is wholly speculative. Neither Sims nor FICA alleged any such injury relating to financing. A federal court cannot create its own jurisdiction by imagining what injury the plaintiff might have suffered. Rather, the burden is on the plaintiff to allege concrete injury that is "'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical'." Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (citations omitted).

I also believe that the majority's conclusion that appellees have been injured through their ability to obtain financing, see ante at 1564 n. 9, is unsupportable because it contradicts common sense. Assuming, as the majority has, that an owner would need financing for his automobile after it arrives in the United

States, the lack of title and registration would not be the cause of the owner's inability to obtain financing. An automobile that is conditionally admitted into the United States is subject to a Customs bond, which is not released until Customs officials receive release letters from both the EPA and the NHTSA. If the required safety and emissions requirements are not met within 180 days, Customs officals may sieze the vehicle and export or destroy it. 19 C.F.R. §§ 12.73(c), (e), 12.80(e)(2), (i) (1987). I find it hard to believe that a potential financier would consider issuing a substantial loan securing only by a vehicle subject to imminent seizure, export, or destruction. The customer's ability to produce only a foreign title document or bill of sale, rather than Florida Title and registration documents, is not the cause of the

customer's inability to obtain financing. Any impediment to financing is the result of federal law and the required customs bond, not Florida title and registration statutes.

The Florida statute merely adopts and enforces existing federal standards, in no way inhibiting appellees' conduct or causing them harm.[14] Because appellees

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[14] The gist of appellees' argument may be that they are "injured" because, prior to the enactment of the Florida statute, the gray market prohibitions were only enforced by federal authorities, but now that Florida has encacted section 320.02(9), appellees are subject to both state and federal enforcement of the federal law. In other words, appellees may be asserting tha they have an implied right to violate federal law, and that "right" has been encroached by the State of Florida. This "right to violate federal law" would, of course, have to be a federal right in order to transcend Florida law; in short, an implied federal right to violate express federal law, giving appellees standing to challenge a Florida statute that merely adopts the express federal law. This would be a difficult argument to swallow indeed.

have not alleged any concrete, specific injury, they have created a hypothetical case, one which the federal courts are not empowered to decide under article III of the Constitution. The majority violates this fundamental rule of the article III jurisdiction by accepting all too readily appellees' conclusory statements of "injury," see ante at 1563-64, fortifying its finding of actual injury with speculations of its own, see ante at 1564-65 & n. 9, and then placing the burden on th State of Florida to disprove these allegations of injury. See ante at 1563. Accordingly, I would dismiss the case for lack of standing.

IV.

I would also dismiss this action as moot, at least with respect to appellees Sims. The majority holds that her action is not moot, however, because it agrees with the State of Florida's concession that Sims' injury is "capable of repetition yet evading review.'" Ante at 1570. Because mootness implicates the court's jurisdiction under the case-or-controversy requirements of article III, the parties' agreement that the case is not moot and their desire to litigate the merits cannot relieve this court of its duty to detemine for itself whether a case is now moot. DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 1706, 40 L.Ed.2d 164 (1974).

On September, 18, 1985--three months before the lower court issued its opinion in this case--the NHTSA issued its bond release letter, authorizing Customs to

proceed with final admision of Sims' vehicle. Sims now has the documents necessary to comply with Fla.Stat. § 320.02(9) and obtain title and registration for her vehicle. Accordinly, Sims no longer has a personal stake in the outcome of this appeal, and her action is now moot. The majority, however, holds that her case is not moot because it is "capable of repetiton yet evading review." Ante at 1570. I believe that this exception to the mootness doctrine is not applicable to this case.

In Weinstein v. Bradford, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), the Supreme Court defined the showing necessary to fall within the "capable of repetiton yet evading review" exception to the mootness doctrine. The Supreme Court stated that

in the absence of a class action, the

> "capable of repetiion, yet evading review" doctrine was limited to thesituation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again.

Id. at 149, 96 S.Ct. at -349. In the present case, Sims fails to fall within this exception because she fails to fulfill the second requirements, i.e., her cause is not "capable of repetition." Sims has not alleged that she intends to import another noncomplying automobile and seek title and registration in Florida. At most, there is only a physical or theoretical possibility that she will do so. A mere possibility, however, is not enough to fulfill the second prong of the mootness exception. Murray v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982). Rather, in order to be

sufficiently "capable of repetition," "there must be a 'reasonable expectation' or demonstrated probability' that the same controversy will recur involving the same complaining party." Id. (quoting Weinstein, 423 U.S. at 149 96 S.Ct. at 348). Accordingly, Sims' cause of action is not "capable of repetition yet evading review," and I would dismiss her case as moot.[15]

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[15] Sims argues that her case is not moot because the Florida Department of Highway Safety and Motor Vehicles (DMV) might still refuse to issue Sims her registration and title documents, even though she has received all the federal documents required by section 320.02(9). This contention, however, is insufficient to save her cause of action from a dismissal on mootness grounds. If the officals at DMV still refuse to issue the documents, they are in violation of section 320.02(9), and Sims' recourse is to bring a suit for mandamus to compel the issuance of documents, not to maintain this action challenging the constitutionality of the statute.

V.

In light of my conclusions that both appellees lack standing to challenge the Florida statute, and that appellee Sims' cause of action is moot, I should refrain from discussion the merits. Nonetheless, I am compelled to respond to the majority's concluion that Fla. Stat. § 320.02(9) violates the commerce clause of the United States Constitution because the majority, overlooking commerce clause precedent, restricts the states' power to regulate interstate commerce when Congress has authorized them to do so.

The commerce clause acts as both an explicit grant of power to Congress to regulate interstate commerce and an implicit limitation on state authority preventing the states from unduly interfering with interstate commerce. Western & Southern Life Ins. Co. v. State

Bd. of Equalization, 451 U.S. 648, 652, 101 S. Ct. 2070, 2074, 68 L.Ed.2d 514 (1981). The commerce clause, however, does not bar all state statutes that interfere with interstate commerce. Where a statute is narrowly drawn to regulate matters of local concern, that statute will not be struck down unless its impact on interstate commerce outweighs the state regulatory concern promoted by the statute. Kassell v. Consolidated Freightways Corp., 450 U.S. 662, 670-71, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981). Nor does the commerce clause bar state regulation where Congress has chosen to allow state regulation of an aspect of interstate commerce. "Congress, if it chooses, may exercise [its commerce clause] power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. "Lewis v. BT Investment

Managers, Inc., 447 U.S. 27, 44, 100 S.Ct. 2009, 2020, 64 L.Ed.2d 702 (1980). If Congress has conferred such power on the states, any state statute promulgated pursuant to this authorization "is rendered invulnerable to Commerce Clause challenge." Western & Southern Life Ins. Co., 451 U.S. at 652-53, 101 S.Ct. at 2075.

I disagree with the majority's conclusion that Florida Stat. § 320.02(9) violates the commerce clause because I find that Congress has generally authorized the states to engage in the sort of regulation provided by the Florida statute. As the majority recognizes, ante at 1565-68, the Safety Act authorizes state enforcement of the federal standards. See 15 U.S.C. § 1392(d) (1982) (preempting any state standard "which is not identical to the federal standard"); S.Rep. No. 505, 97th Cong., 2d Sess. 6, reprinted in 1982 U.S.

Code & Admin. News 3169, 3174 (states are not barred from enforcing federal Safety Act standards). Accordingly, I believe that Fla.Stat. § 320.02(9) enforces the Safety Act.

Section 320.02(9), however, also seeks to enforce provisions of the Clean Air Act. The proper approach, therefore, is to examine the incremental burden caused by seciton 320.02(9)'s enforcment of the Clean Air Act. This incremental burden on interstate commerce is, at best, nominal.

Any gray market automobile brought into the United States cannot be operated or sold until it is brough into conformity with Clean Air Act standards. This restriction applies no matter to which state the vehicle is brought. The only burden on interstate commerce imposed by Florida that is not imposed by other states is that gray market automobiles arriving in

Florida ports cannot be titled or registered until Clean Air Act requirements are met. As I have stated, I cannot perceive, nor do appellees aver, any legitimate reason why an owner would need to have tile and registration before he is able, under federal law, to operate or sell his gray market vehicle. There simply is no rational, legal reason why an importer would be discouraged from importing a gray market automobile into Florida as opposed to another state. Accordingly, I disagree with the majority's conclusion that "[t]he Florida Statute directs the stream of commerce in gray market vehicles from Florida to other states for those owners who have legitimate reasons for registering and titling their vehicles before being able to use them on the roads of Florida," ante at 1569, and would find no commerce clause violation resulting from

the incremental burden created by Florida's enforcement of Clean Air Act requirements.

APPENDIX B2.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86--3055

MYRA HOLLADAY SIMS and
FLORIDA IMPORT AND COMPLIANCE
ASSOCIATION,

Plaintiffs-Appellees,

versus

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (Opinion December 2, 1987, 11th Cir., 198__, ___ F.2d __)

(March 1, 1988)

Before:
RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KARVITCH, JOHNSON, HATCHETT, ANDERSON, and EDMONDSON, Circuit Judges*.

B Y T H E C O U R T:

A member of this court in active service having requested a poll on the application for rehearing in banc and a majority of the judges of this court in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED that the above cause shall be reheard by this court in banc with oral argument during the week of June 6, 1988, on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of in banc briefs. The previous panel's opinion is hereby VACATED.

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* Judge Clark is recused and will not participate in this decision.

APPENDIX C:

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3055
D.C. Docket No. 85-7214

MYRA HOLLADAY SIMS and
FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Plaintiff-Appellees,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

Before RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, EDMONSON and COX, Circuit Judges.*

JUDGMENT ON REHEARING AND SUGGESTION FOR REHEARING IN BANC

This cause came on to be heard on petiton for rehearing in banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered that the opinion dated December 2, 1987 is VACATED; and it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and REVERSED in part;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: January 11, 1989
For the Court: Miguel J. Cortez, Clerk

_____ Deputy Clerk

ISSUED AS MANDATE: MAR 13 1989

decision.

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*CLARK,Circuit Judge, did not participate in the decision of this case.

TJOFLAT, Circuit Judge, dissented and filed an opinion in which HILL, KRAVITCH and EDMONDSON, Circuit Judges, joined. COX, Circuit Judge, concurred in Part IV of Judge Tjoflat's

APPENDIX D1.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MYRA HOLLADAY SIMS and
FLORIDA IMPORT AND COMPLIANCE
ASSOCIATION, an unincorporated
association,
Plaintiffs,

vs.

TCA 85-7214-WS
Order & Final
Judgement

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES and JIM SMITH,
ATTORNEY GENERAL OF THE STATE
OF FLORIDA
Defendants.

This cause is before the court on plaintiffs; complaint for declaratory and injunctive relief (document 3). A hearing was held on July 31, 1985, on plaintiffs' motion for preliminary injunction at which the motion was denied and final hearing set. At the final hearing on September 12, 1985, the court heard testimony from the parties and

experts and heard arguments of counsel. Ruling was deferred, and this memorandum order shall serve as a final judgment in this case.

I.

Florida Statute Section 320.02(9) (1984 Supp.), effective October 1, 1984, is the subject of plaintiffs' suit, and it provides in pertinent part as follows:

> Before a motor vehicle which has not been manufactured in accordance with the federal Motor Vehicle Safety Act can be titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the NHTSA Agency to be in compliance with these federal standards.

Plaintiffs challenged the statute on two grounds at the final hearing. First plaintiffs claim that the statute is pre-empted under the Supremacy Clause of the United States Constitution. Secondly, they claim that the statute violates the Commerce Clause of the Constitution. Defendants deny that the statute runs afoul of the Constitution and assert that this statute is a valid exercise of the

state's police power.

Myra Holladay Sims bought a foreign car and, acting as an importer, had the car brought into Jacksonville, Florida. Once the car was at the United States port of entry, Sims endeavored to comply, and in fact did comply, with all the byzantine rules and regulations of the three federal regulatory agencies involved: the United States Customs Service (USCS), the Environmental Protection Agency (EPA), the National Highway Transportation Safety Administration (NHTSA).

First Sims posted a bond in the amount of the value of the car plus the duty, a bond to isure compliance with EPA and NHTSA standards. Under EPA's "mitigation policy" (See, plaintiffs' Ex. 8A at p.2, and 18 at p.5), Sims was exempt from conforming her car to the applicable emission standards; thus, Sims received a letter from EPA releasing the EPA obligation on the bond. Plaintiff's Ex. 8A, p.2. This "mitigation policy" plays a signifcant role in Sims' later problem with

the State Department of Motor Vehicles (DMV). Sims was required to convert the car to meet Safety Act standards. She got all the required documentation and sent it to MHTSA on June 3, 1985. Plaintiff's Ex. 20.

That is as far as the paperwork has gone. Sims still has not received a bond release letter from NHTSA, and it is not likely that she will receive one in the near future because in July 1985, NHTSA had 14,000 forms to review. Plaintiff's Ex. 21. The seed of Sims' complaint lies in this bureaucratic traffic jam.

Under Section 320.02(9), Florida Statutes, Sims' car must be "certified" by Customs or by DOT and EPA to be in compliance with federal standards before it can be titled and registered in Florida. There is in actuality no "certification" from any of these agencies, only "release letters." Mr. Chandler, the assistant director fo the DMV, observed that the statutory language was "an unfortunate choice of words." From Customs, an

importer would get a "bond release letter." Plaintiff's Ex.23. Yet Mr. Charles J. Brantley, in a memorandum to all tax collectors, tag agents, DMV supevisors and inspectors, asserted that "[a]ccording to a state law effective October 1, 1984, it is illegal to title or register a grey market vehicle [industry terminology for cars imported by individuals, not intended as a derogatory term] in Florida until the vehicle is converted and certifed by U.S. Customs officials to meet both the EPA and DOT requirements." Plaintiff's Ex.14. Brantley further instructed in a December 6 memorandum that a U.S. Customs Entry Form, the U.S. Customs Bond Release Form, and EPA and DOT certification will be required. Mr. Chandler testified that the "or" in the statute should be changed to "and," because three forms or "certificates" are required by DMV before it will be satisfied.

While these problems in sloppy draftsmanship and interpretation are troubling, they can be correced by a narrowing interpretation of the statute; these problems pale beside the charges brought by the plaintiffs that the entire statute is invalid as being preempted by federal law and as being a burden on commerce. It is to those claims that the court now turns.

II.

The area of relations between the federal government and the states in our system of government is an often sensitive one, Garcia v. San Antonio Metropolitan Transit Authority, U.S. ___, 83 L. Ed.2d 1016 (1985), and shall not be entered into lightly by the federal judiciary. This court is aware of that caution, and it is with care and precision that it approaches the issues raised by the plaintiffs in their action presently at bar.

The doctrine of federal preemption of state laws is derivd from Article VI, Clause 2, of the United States Consitution. The Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

There are differing levels of preemption, applicable in different situations. As the United States Supreme Court recently stated in Michigan Canners and Freezers Association Inc. v. Agricultural Marketing and Bargaining Board, U.S. ____, 104 S.Ct. ____, 81 L.Ed.2d 399, 406 (1984):

> Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define extent to which it intends to pre-empt state law. E.g. Shaw v. Delta Air Lines, ___ U.S. ___, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). Second, even in the absence of express pre-emptive language,

> Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. [Citation omitted] Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law.
>
> . . . .

These three levels of preemption are ranked above in descending order of constitutional importance.

This court is mindful of the recent statement in this area by the Supreme Court in Hillsborough County, Florida v. Automated Medical Laboratories, Inc., ___ U.S. ___, 105 S.Ct. 2371 (1985), in which the Court stated that a presumption exists that state regulation of matters relating to health and safety are not preempted under the Supremacy Clause. This preemption, however, may be overcome by a showing that it was the will of Congress to preempt state action in the area. This court feels that just such a showing regarding the Clean Air Act and the safety standards under the National Highway Transportation Safety Administration and

the Motor Vehicle Safety Act has been made in this case so that the challenged Florida statute must fall as having been preempted by federal action in the area.

The Clean Air Act, 42 U.S.C. § 7543(a) provides in pertinent part:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial sale,titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. (emphasis added).

The state argues that it is not setting any emission standards of its own that must be met and that the challenged statute simply "insures that new cars coming on to Florida's highways comply with the Clean Air Act." Brief of defendants at 19. The state fails to recognize, however, that it is not its role to enforce such standards at the

stage that it seeks to do so. It does not matter if the state has enacted standards that are different or identical to those enacted by the federal government at this point. The intent of Congress is very clear and specific: Prior to the first sale, the states are preempted from enacting any regulatory or enforcement scheme either of their own or to complemet the federal scheme, with specific regard to titling and registration. Yet, this is precisely what the challenged Florida statute seeks to do. Enforcement of the Clean Air Act before first sale is the sole and exclusive prerogative of the federal government. This is made clearer by Section 7543(d), relating to control, regulation, or restrictions on registered or licensed motor vehicles, which permits state enforcement of standards following the registration or licensing of motor vehicles: "Nothing in this part shall preclude or deny to any State or political subdivison thereof the right otherwise to control, regulate, or restrict the use, operation,

or movement of registered or licensed motor vehicles." Thus, this court holds that the provisions of Section 320.02(9), Florida Statutes, relating to conditioning the registration and titling of automobiles not manufactured in accordance with federal standards on "certification" from the EPA is preempted by federal legislation.

Turning to the Motor VEhicle Safety Act, 15 U.S.C. § 1392(d) provides in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The state argues again that it is not enforcing safety standards of its own, but is in fact merely requiring that the federal standards be met before a vehicle is allowed onto the state's highways.

The task of discerning the intent of Congress regardig the role of states in enforcing the safety standards under the Motor Vehicle Safety Act is somewhat more difficult. However, once the outlines of the state's role is discerned, the invalidity of Section 320.09(9) is clear.

In January of 1982, the NHTSA issued an interpretative ruling regarding the Motor Vehicle Safety Act. It declared that:

> The agency believes that the Act and its history strongly and clearly imply that Congress intended this agency to play an exclusive role in ensuring compliance of new motor vehicles and equipment with the FMVSS Federal Motor Vehicle Safety Standards. Congress intended further that States having any standards identicla to the FMVSS would enforce them over the lives of motor vehicles and euipment after their first sale to consumers.

This ruling did not escape the notice of Congress in considering subsequent action regarding the Motor Vehicle Safety Act. The Senate Committee on Commerce, Science, and Transportation noted in

its report on amendments to the Act that:

> [I]n January 1982, NHTSA issued a new opinion on section 103(d) which . . . stated that the Safety Act pre-empts States from presale enforcement of safety standards, prohibits States from requiring fees for State approval, and prohibits States from imposing requirements for approval which have the effect of prohibiting the sale of equipment which has been self-certified under the Federal statute.

Senate Report 97-505, 3 U.S. Cong. & Admin. News 3169, 3174 (1982).

The Committee went on to clarify the role of states in the enforcement of federal safety standards in light of the ruling by the NHTSA and in accordance with the will of Congress. The Committee declared that: "It is the Committee's belief that States have an active and positive role to play in protecting motor vehicle safety, and that this is consitent with the federal statute." Id.. at 3174. The Committee explicitly stated just what role it felt the states should play:

> The Committee intends that States are not pre-empted from enforcing safety standards identical to Federal

> standards which they have adopted. States may not require certification or approval of motor vehicles or motor vehicles equipment. However, State enforcement may be carried out accordingly to applicable State laws. States may undertake independent testing, and also may require manufacturers to submit adequate test data concurrent with first sale or thereafter. States may make a determination of the adequacy of such dta including review of laboratory qualifications. If test data are not submitted, if a State has good reason to believe that submitted data are inadequate, or if a product does not comply with applicable Federal and identical State-adopted standards, States may use rememdies, including prohibition, in accordance with relevant States laws.

Id. (emphasis added).

Clearly, such language looks to the period following the first sale of an automobile as the appropriate time for state action, not before. Further:

> Because the federal role in enforcing safety standards is one of compliance testing on a random basis, the Committee believes that State programs will complement the Federal regulator scheme. In enforcing standards, States should strive to limit duplication among themselves and with NHTSA. They

> should be encouraged to share information and administrative costs in order to attain this goal.

Id.

This language indicates that state inspection programs, such as that abandoned by Florida in 1981, would be the legitimate method for the state to check for compliance with federal safety and emission standards. Such programs operate after the fact of the first sale of an automobile. As is clear from the above quoted language, the role of the states in enforcing the federal laws and regulations is confined solely to the period after the first sale of an automobile. Before the first sale the federal government has sole responsibility for enforcement. It makes no difference that state schemes would "complement" or "enhance" enforcement of the federal law. The states are absolutely barred from acting in any manner whatsoever in the area. Congress has completely occupied the field of pre-sale enforcement. The intent of Congress in the passage of this Act has been examined before in

federla court in Truck Safety Equipment Institute v. Kane, 466 F. Supp. 1242 (M.D. Pa. 1979) (on remand from 558 F. 2d 1028 (3d Cir. 1977)). Although that court was presented with a different question, it is relevant to note that it reached the same conclusion as to congressional intent that we reach today. As the court stated:

> Throughout the legislative history the emphasis of the first sales of the equipment is the federal standards, reserving to the states the enforcement of the identical standards after the first sale.
>
> It seems to me that the only logical conclusion we can reach is that the [challenged] Law and Regulations as far as they apply to this case are preempted from enforcemnt at the manufacturer, distributor, dealer level. (emphasis added).

Id. at 1250. Likewise in this case, the provisions of the challenged Florida statute relating to "certification" by the Department of Transportation that such vehicle has been modified to comply with the Motor Vehicle Safety Act is preempted by federal legislation.

The state argues that:

> If Florida's law is declared preemped then Florida would be placed in a position of both aiding the violation of federal law by allowing cars to be operated and sold before the federal government approves the modifications and admitted into the count[r]y and allowing known safety and health hazards onto Florida's highways.

Brief of defendant at 15, note 2.

This court is not swayed by such concern for the enforcement of federal law in this area. If one thing has become clear during the resolution of this case, it is that there is nothing in federal law to prohibit states from enacting enforcement schemes of their own to enforce the provisions of the Clean Air Act and the Motor Vehicle Safety Act following the first sale of the vehicle. In fact, Congress explicitly encourages such actions. See, e.g., Senate Report 97-505, 3 U.S. Cong. & Adm. News at 3174, supra. Indeed, Florida formerly had an automobile inspection program to do just that. If Florida is concerned about possible violations of the federal laws to insure motor vehicle safety

and clean air, there are abundant avenues of action open to it to pursue. The one that it has chosen with this statute, however, is blocked off by a "No Entry" sign of federal action. The state must seek another entrance ramp onto the limited access highway of regulation of motor vehicle safety and emissions.

III.

Even were the challenged Florida statute not preempted by federal law, it would have to fail as it is a burden on foreign commerce as prohibited by the Constitution under Article I, section 8, clause 3.

The principle weakness with the Articles of Confederation and one of the major reasons for the calling of the Constitutional Convention was the indepenence of the states under the Articles to enact their own laws regarding commerce with foreign nations. A unified, national approach was needed if the separate states were to forge a single unified nation--hence the Commerce Clause.

This insures that the nation speaks with "one voice." Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

The State of Florida maintains that this statute is not a burden on foreign commerce because grey-market cars are not legally in the United States until they are "finally admitted" by Customs. Since the cars are not in the stream of commerce, the statute cannot, by definition, burden commerce. This argument mispercieves the issues, however. The "final admission" by Customs that the state points to is not a wholly cut and dried procedure and may indeed take years before a final decision on an imported article is made relinguishing all claims by the United States government. More to the point, however, is that a principal reason that these gray-market cars are not in the stream of commerce as perceived by the state is the challenge statute. The statute prevents the titling and registration of vehicles which in turn limits the marketability of the

cars. To force an importer to use a different port of entry, for example Savannah, Georgia, or Mobile, Alabama, in order to receive registration and titles from the relevant state authorities without having to endure th trials and tribulations that Florida has erected in their path destroys the common market of commerce for the entire United States as established by the Constitution. It is precisely this type of state action that the Commerce Clause was designed to prevent; thus the statute is constitutionally infirm. As the state has presented no evidence that this law is necessary to serve some special local consideration, it cannot survive scrutiny under this section of the Constitution.

The court has considered defendants' affirmative defenses and finds them to be without merit. Accordingly, it is ORDERED that:

(1) Section 320.02(9) is hereby declared invalid for the reasons stated herein.

(2) Defendant is hereby permanently enjoined from further enforcement of the statute.

(3) Judgment is hereby entered in favor of the plaintiffs and plaintiffs shall be awarded their costs in this action.

DONE and ORDERED this 30th day of December, 1985.

WILLIAM STAFFORD
CHIEF JUDGE

APPENDIX D2:

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MYRA HOLLADAY SIMS,
et al.,

Appellees Case No. 86-3055

vs.

STATE OF FLORIDA,
etc.,

Appellant.
_____/

PETITION FOR REHEARING

The Appellant hereby requests that this Court rehear that portion of its decision of January 11, 1989 holding Section 320.02(9), Florida Statutes entirely unconstitutional, after finding that the law was not preempted by the Motor Vehicle Safety Act. 15 U.S.C. 1392 et seq. Since the unconstitutional provision of the act can be separated from the constitutional provisions of the Section 320.02(9), this Court cannot strike the

entire law.

A COURT IS TO VOID ONLY THOSE PORTIONS OF A LAW THAT ARE UNCONSTITUTIONAL AND TO SEVER THOSE PORTIONS FROM THE REMAINDER OF THE ACT THAT IS CONSTITUTIONAL

This case arises out of the question of the constitutionality of Section 320.02(9), Florida Statutes, which requires the owner of a gray market vehicle, prior to receiving a title and registration from the State of Florida, to present to the Florida Department of Highway Safety and Motor Vehicles proof of compliance with the federal Clean Air Act and Safety Act. Under the Florida scheme, both assurances were necessary. On January 11, 1989, this Court ruled that Section 320.02(9) was preempted by the Clean Air Act, slip op. pp. 823-824, but found the Florida law was not preempted by the Safety Act, slip op. pp 824-827. However, instead of ordering the State not to enforce the unconstitutional provisions of Section 320.02(9), the Court has ruled the entire law

unconstitutional.[1]

As Florida believes that the Safety Act provisions of Section 320.02(9) are severable from the Clean Air provisions, the Appellant submits that the Court has improperly failed to follow precedents of the United States Supreme Court, the Fifth Circuit Court of Appeals and this Court that require voiding only the unconstitutional portions of a law and permitting the other provisions to be enforced.

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[1] By so holding Section 320.02(9), Florida Statutes, unconstitutional, the Court avoided the commerce clause question before the Court. However, Section 320.02(9) is no different than the Texas statute in Direct Automobile Imports Association, Inc. v. Townsley, 804 F.2d 1408 (5th Cir. 1986) that the Fifth Circuit found was not preempted by the Safety Act; not in violation of the Commerce Clause; and, thus, enforceable.

A.

A COURT IS REQUIRED TO UPHOLD THOSE PORTIONS OF A STATUTE THAT ARE CONSTITUTIONAL AND SEVERABLE

It is axiomatic that a statue, state or federal, is presumed to be valid. National R.R. Passanger Corp. v. Atchinson, Topeka & Santa Fe Ry. Corp., 470 U.S. 451 (1985); Clements v. Flashing, 547 U.S. 957 (1982); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Because of this presumption, each statute must be construed to be constitutional if at all possible, thereby avoiding striking the entire statute. St. Martin Evanglical Luthern Church v. South Dakota, 451 U.S. 772 (1981). The courts are to give a constitutional construction by reading it reasonably. U.S. v. Thomas, 567 F.2d 299 (5th Cir. 1978). But, if a portion of the law is found to be unconstitutional, the courts are under an obligation to uphold the law by severing the invalid portions from the law and permitting the remainder of the law to stand. Scheinberg v. Smith, 659 F.2d 476, 481 (5th Cir.

1981), rehearing den'd., 667 F.2d 93 (5th Cir. 1981). To sustain the law, the courts are to subject the terms of the law to a narrowing construction that would preserve the validity of the act. Erzonznik v. City of Jacksonville, supra; Cruz v. Ferre, 571 F.Supp. 125 (S.D. Fla. 1983). Finally, if a federal court finds that the courts of the state could or would adopt a construction of the statute that eliminates the constitutional defect, then the federal court is to defer to the state and uphold the non-offending provision. See, Time, Inc. v. Hill, 385 U.S. 374 (1967).[2] The Appellant submits that this Court has failed to follow the Supreme Court's and its own decisions on the severability of constitutional aspects of a

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[2] Under Florida law, a court is obliged to adopt a construction of a statute that is constitutional. See, Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1985), answer to certified question conformed to 802 F.2d 1347 (11th Cir. 1985); Industrial Fire & Casulty Insurance Co. v. Kwechin, 447 So.2d 1337 (Fla. 1983).

state statute. Moreover, the Court makes no attempt to give the law a narrowing construciton, even after finding the Section 320.02(9) was not preempted by the Safety Act, thus permiting a portion of the act to be upheld.

B.

COURTS ARE REQUIRED TO REVIEW A CHALLENGED LAW TO SEE IF THE OFFENDING PROVISIONS CAN BE SEVERED AND UPHOLD THE CONSTITUTIONAL PROVISIONS IN A LAW THAT CAN BE SEVERED

Appellant submits that this Court is under an affirmative obligation to review Section 320.02(9) to see if those parts found by the Court to be constitutional can be severed from the offending portions of the law and still have an independently enforceable law.

It has long been the law of the United States Supreme Court that the federal courts are not to engage in wholesale invalidation of laws. Rather, they are to see if the repugnant provisions can be

separated from the remaining parts.[3] If part of the challenged law is invalid, the court is to strike the offending portions but uphold the valid parts. Brockett v. Spokane Arcades, Inc., 742 U.S. 491 (1985); Broadwick v. Oklahoma, 413 U.S. 601 (1973); Bank of Hamilton v. Dudley's Lessee, 27 U.S. 492, 27 Pet. 492 (1829) (the bad parts of a law may be disregarded giving full effect to the non-repugnant); CISPES (Committee in Solidarity) v. F.B.I., 770 F.2d, 468, 469-70 (5th Cir. 1985). As the Supreme Court said in Brockett:

> the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected

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[3] "Whenever an act of Congress contains unobjectional provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the act in so far as it is valid." El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909).

Id., 472 U.S. at 502, quoting Allen v. Louisiana, 103 U.S. 80, 83-84 (1881).[4] The Supreme Court reached that same result in Regan v. Time, Inc., 468 U.S. 641 (1984) (plurality opinion). Judge Fay, writing separately, in President's Commission On Organized Crime v. Scaduto, 763 F.2d 1191 (11th Cir 1985), cited Regan for the general proposition of severability and then stated "[i]f the unconstitutional portion of a statute can be severed, the remaining portion should be uphold". Id., 763 F.2d at 1201.

The Supreme Court has held that the constitutional provisions of a law are presumed to be severable if what remains after the severence is fully operative as a law. Alaska Airlines, Inc. v.

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[4] For examples of cases in which the remainder of a statute was upheld while part of the statute was declared invalid, see, Buckley v. Valeo, 424 U.S. 1 (1976); U.S. v. Jackson, 390 U.S. 570 (1968); and El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87 (1909).

Brock, ___ U.S. ___, 107 S.Ct. 1476, 1479-80 (1987); I.N.S. v. Chadha, 462 U.S. 919, 934 (1983); U.S. v. Johnson, 390 U.S. 570 (1968). This holding arises from the basic principle of the presumption in favor of severability, reasoning that severence is preferable to striking an entire act. Regan, 468 U.S. at 653.

The test of severability is that restated by the Supreme Court in Alaska Airlines. If dropping the invalid part will leave a fully operative law, then the invalid part is to be discarded and the remainder of the law can be enforced. Id., 107 S.ct. at 1480. Furthermore,

> [u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Buckley v. Valeo, 424 U.S. 1, 108 (1968), quoting Champlin Refining Co. v. Corporation Commission of

Oklahoma, 286 U.S. 210, 234 (1932).[5] To not have severability, the parts of the law, constitutional and unconstitutional, must be mutually dependent upon one another so that one part will not stand without the other. See, Carter v. Carter Coal Co., 298 U.S. 38 (1936).

The Fifth Circuit, in Scheinberg v. Smith, supra, examined one of Florida's abortion laws to determine if the invalid portion was severable from the remainder of the non-repugnant part in order to give effect to the remaining portions. In that case, the Fifth Circuit found the offending provision was one of the cornerstones of the act and the valid and invalid parts were mutually

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[5] A statute is not required to have a severability clause in order for the court to sever the valid from the invalid. The absence of a severability clause does not reaise the presumption against severability. Alaska Airlines, Inc. v. Brock, 107 S.Ct. at 1481. See also, Tilton v. Richardosn, 403 U.S. 672, 684 (1971) (plurality decision).

dependent upon one another. Because of the interdependence, and the inability of the remaining provisions to stand alone without the unconstitutional parts, the court struck the entire law.

The Appellant submits here that an examination of Section 320.02(9) will end in a conclusion quite different than that reached in Scheinberg as, unlike Scheinberg, the Clean Air and Safety Act provisions of Section 320.02(9) are not dependent upon each other; they are distinct and fully independent of one another.

C.

THE CLEAN AIR PROVISIONS ARE SEVERABLE FROM THE SAFETY ACT REQUIREMENTS IN SECTION 320.02(9), FLORIDA STATUTES

The Appellant submits that the offending parts of Section 320.02(9), Florida Statutes, can be excised from the law and the expressly non-offending provisions can be enforced. If the non-offending provisions can be severed, then this

Court is under the obligation not to strike those provisions.

The regulatory scheme of Section 320.02(9), as examined by the Court, is quite simple. The State sought to insure that its highway were safe and pollution free from gray makret vehicles. To acquire this assurance, the owner of a gray market vehicle is required to present to the State evidence of his or her compliance with Federal laws and regulations concerning safety and air emmissions. The owner provides this assurance by presenting to the local title clerk two sets of evidences of approval, one from the Environmental Protection Agency (EPA) and the other set from the National Highway Traffic Safety Administration of the United States Department of Transportation (NHTSA).

The federally required proofs of compliance with the respective laws and regulations are separate and distinct from one another. Each agency, EPA and NHTSA, requests different

information about the vehicle to make different determinations relevant to the respectives laws and regulations each agency enforces. Each agency receives separate sets of documents and other proofs of compliance from the vehicle owner, reviews the informations submitted and decides whether the vehicles are acceptable based upon each agency's individual rules and regulations and the respective federal law. If accepted, each agency issues to the vehicle owner a letter of acceptance. Neither agency depends upon the information or decision of the other agency in making its respective determination on the particular vehicle. Thus, each decision is totally independent of the other; one decision is not dependent on the other.

Under the present ruling of the Court, Florida Department of Highway Safety can no longer request proof of compliance with the Clean Air Act from the vehicle owner prior to the titling and registration of the vehicle. However, this Court expressly

found that those provisions of Section 320.02(9) requiring proof of compliance with the Safety Act prior to titling and registration were not preempted by the Safety Act. What remains after the invalidation of the Clean Air provisions of Section 320.02(9) is the Safety Act proofs of compliance. Using the Supreme Court's test of severability in Alaska Airlines, Inc. v. Brock, supra, the question then is: is what remains of Section 320.02(9) a fully operable law and can the Safety Act parts of Section 320.02(9) be enforced separately? The Appellant submits that the answers to both questions are yes.

What remains after the excising of the Clean Air parts of Section 320.02(9) is a fully operative law. What remains, after this Court finding that Section 320.02(9) was not preempted by the Safety Act, is a law requiring proof of complaince of the Federal Safety Act before the vehicle owner can receive a title or registration for the gray market vehicle. The Safety Act has stated, and this Court

has agreed, that a state can regulate safety items after the initial sale of these vehicles. By asking for proof of complaince after the sale, Florida is merely exercising its legitmate police powers in accordance with the Safety Act.

While the Florida Legislature chose to combine the two proofs of compliance into one law in 1984 when it enacted Section 320.02(9), it did not have to. Since the request for each proof of complaince with both Federal law is based upon two different and distinct reasons (safety and clean air), the Legislature could have enacted two separate statutes each requiring different forms of proof of compliance. Each one could have stood alone without dependence upon the other. Or, Florida could have enacted one statute requiring different forms of proof of complaince with only one of the two Federal acts. That is exactly what the Commonwealth of Virginia did in 1986 when it enacted a similar law. Instead of requiring proof of compliance with both Federal laws, Virginia only

requires proof of compliance with the Safety Act prior to its issuing a title and registration to a gray market vehicle. See, Va. Code 46.1-41.2 (1986). But like Florida's intended regulatory scheme, Virginia will not title and register a gray market vehicle until the proof of compliance with the Safety Act is presented to the Virginia officials.

Section 320.02(9) is a fully opertive law without the Clean Air provisions like the laws of Texas and Georgia after the decisions in Direct Automobile Imports Association, Inc. v. Townsley, 804 F.2d 1408 (5th Cir. 1986) and Georgia Automobile Importers Compliance Association, Inc. v. Bowers, 639 F.Supp. 352 (N. D. Ga. 1986). Both federal courts examining those respective statutes upheld the Safety Act provisions of those laws, only striking the offending Clean Air provisions of the laws. Neither court, unlike this Court, struck the entire law before them. A recent examination of both statutes reveals that both Texas and

Georgia have retained their laws in the statute books with the mere notation that each respective law is preempted by the Clean Air Act. See, O.C.G.A. sec's.16-9-110, 40-2-25.1, 40-3-29.1 (1988 Supp.). Thus, Texas and Georgia each have fully operative laws and are free to enforce the remaining Safety Act portions of their respective laws.

The Safety Act portions of Section 320.02(9) can be enforced separately. The past practice in enforcing Section 320.02(9), prior to the initiation of this lawsuit was for the local title clerk to request proof of compliance with both the Safety Act and Clean Air Act from the vehicle owner at the time the vehicle owner sought his or her title and registration from Florida. Since the NHTSA is still issuing letters to vehicle owners establishing acceptance of their vehicles, it would be very easy for the Department of Highway Safety to merely inform its employees and agents in the State that from this date forward to only request

from the vehicle owner, at the time of registration, the proof of compliance from NHTSA before issuing a title and registration to the gray market owner.

In both a legal and practical sense, the provisions of Section 320.02(9) that this Court found constitutional can easily be separated from the offending provisions of Section 320.02(9). Requesting proof of compliance with the Safety Act does not in any way depend upon proof of compliance with the Clean Air Act.

CONCLUSION

For the reasons set out above, this Court should reconsider its decision of January 11, 1989; reexamine Section 320.02(9), Florida Statutes, in light of the requirements of severability and determine if the constitutional provisions of Section 320.02(9) can be severed from the offending provisions and stand alone.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol
Tallahassee, Florida 32399-1050
(904) 487-2142

APPENDIX D3:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3055

MYRA HOLLADAY SIMS and
FLORIDA IMPORT AND COMPLIANCE
ASSOCIATION,

Plaintiffs-Appellees,

vs.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(IN BANC OPINION RENDERED: 1/11/89)

ON PETITION(S) FOR REHEARING
( )

Before:

RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, EDMONDSON, and COX, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by the appellant is denied,

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

FILE STAMP DATED: MARCH 2, 1989

APPENDIX E:

APPENDIX E1a: CONSTITUTIONAL PROVISIONS

SUPREMACY CLAUSE:

This Constituion, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E1b:

ARTICLE III:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all

Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between Citizens of different States;--between Citizens of the same States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX Elc.

FOURTH AMENDMENT:

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; or shall any person be subject for the same offence to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E1d.

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX E2 STATUTORY PROVISIONS

APPENDIX E2a:

Section 320.02, Florida Statutes (1985)

(9) Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. A vehicle which is registered pursuant to this subsection shall not be titled as a new motor vehicle.

APPENDIX E2b.

CLEAN AIR ACT

APPENDIX E2bi: 42 U.S.C. §7522

Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited--

(1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine unless such vehicle or engine

unless such vehicle or engine is covered by a certificate of confomity issued (and in effect) under regulations prescribed under this part (except as provided in subsection (b) of this section);

(b) Exemptions; refusal to admit vehicle or engine into United States; vehicles or engines intended for export

(2) A new motor vehicle or new motor vehicle engine offered for importation or imported by any person in violation of subsection (a) of this section shall be refused admission into the United States, but the Secretary of the Treasury and the Administrator may, by joint regulation, provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditons (including the furnishing of a

bond) as may appear to them appropriate to insure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, cause disposition therof in accordance with the customs laws unless it is exported, under regulations prescibed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new motor vehicle or new motor vehicle engine that fails to comply with applicable

standards of the Administrator under this part.

APPENDIX E2bii: 42 U.S.C. §7524.

Penalties

Any person who violates paragraph (1),(2), or (4) of section 7522(a) of this title or any manufacturer, dealer, or other person who violates paragraph (3)(A) of section 7522(a) of this title shall be subject to a civil penalty of not more than $10,000. Any person who violates paragraph (3)(B) of such section 7522(a) shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor

vehicle or motor vehicle engine.

APPENDIX E2biii: 42 U.S.C. §7543.

State standards.

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicles engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

APPENDIX E2c.

MOTOR VEHICLE SAFETY ACT

15 U.S.C. §1397.

Prohibition against manufacture, sale, delivery, or importation of substandard vehicles and against rendering inoperative certain devices, elements of design or motor vehicle equipment.

(a)(1) No person shall-

(A) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this subchapter unless it is in conformity with such standard except as provided in subsection (b) of this section;

APPENDIX E3: CODE OF FEDERAL REGULATIONS

APPENDIX E3a:

19 C.F.R. §12.73

Federal motor vehicle air pollution control.

(a) Standards prescribed by the Department of Health, Education, and Welfare or the Environmental Protection Agency. Certain new motor vehicles and new motor vehicle engines are subject to emission standards prescribed by the U.S. Environmental Protection Agency or the Department of Health, Education, and Welfare under section 202 of the Clean Airt Act, as amended (42 U.S.C. 1857f-1, sec. 6, Public Law 91-604), as set forth in regulations in 40 CFR Part 85. For purposes of this section, "motor vehicle" means any self-propelled vehicle designed for transporting person or property on a street or highway, and "new motor vehicle"

and "new motor vehicle engine" mean a motor vehicle or engine, respectively, manufactured after the effective date of regulation issued under section 202 of the Act which is applicable to such vehicle or engine (or would have been applicable to such vehicle or engine had it been manufactured for importation into the United States).

(b) Requirements for entry and release. Each motor vehicle or motor vehicle engine offered for importation or imported into the Customs territory of the United States; shall be refused entry unless there is filed with the entry, in duplicate, a declaration verified by the importer or consignee which contains:

(1) The name and address of the importer and the consignee;

(2) The make, model, and model year of

the vehicle or engine;

(3) The vehicle identification number of such vehicle, or the serial number of such engine (if not chassis mounted);

(4) The date of entry, the vessel or carrier of importation, the port or point of entry, and the entry number (where applicable);

(5) A statement that:

(i) Such 1968, 1969, or 1970 model year motor vehicle or motor vehicle engine is covered by a certificate of conformity with Federal motor vehicle emission standards; or

(ii) Such 1971 or subsequent model year motor vehicle or motor vehicle engine is covered by a certificate of conformity with Federal motor vehicle emission standards and is tagged or labeled in accordance with applicable

regulations in 40 CFR Part 85; or

(iii) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards, is being imported solely for purposes of display and will not be sold or operated on the public streets or highways; or

(iv) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards, and the importer or consignee is a member of the armed forces of a foreign country on assignment in the United States, or is a member of the Secretariat of a public international organization so designated pursuant to 50 Stat. 669 (22 U.S.C. 288(b)) on assignment in the United States or is a

member of the personnel of a foreign government on assignment in the United States who comes within the class of persons for whom free entry of motor vehicles has been authorized by the Department of State, and that such vehicle or engine will not be sold in the United States; or

(v) The importer or consignee is a nonresident of the United States importing such motor vehicle or motor vehicle engine solely for personal use for a period not exceeding 1 year, and such vehicle or engine will not be sold in the United States; or

(vi) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards, is being imported solely for purposes of testing, and will not be sold or

operated on the public streets or highways except in accordance with 40 CFR 85.1502, or

(vii) Such motor vehicle or motor vehicle engine is intended solely for export; or

(viii) Such motor vehicle or motor vehicle engine is not subject to the Clean Air Act or regulations thereunder for reasons specified in the declaration; or

(ix) Such motor vehicle or motor vehicle engine is one of a class of vehicles or engines for which an application for certification of conformity is pending before the Administrator of the U.S. Environmental Protection Agency and is being imported under bond in accordance with 40 CFR 85.1503 pending issuance of such certification; or

(x) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards but will be brought into conformity with such standards and is being imported under bond in accordance with 40 CFR 85.1504; or

(xi) Neither the importer nor the consignee possess sufficient information to make any of the preceding declarations but the importer or consignee will seek to determine such information, and such motor vehicle or motor vehicle engine is being imported under bond in accordance with 40 CFR 85.1505.

(c) Release under bond. If a declaration filed in accordance with paragraph (b) of this section states that the entry is being made under

circumstances described in paragraph (b)(5)(ix), (x), or (xi) of this section, the entry shall be accepted only if the importer or consignee gives a bond on Customs Form 7551, 7553, pr 7595 for the production of a declaration that the vehicle is in conformity with Federal emission standards or, in the case of an entry made under circumstances described in paragraph (b)(5)(xi) of this section, for the production of an appropriate declaration under paragraph (b)(5)(i) through (x) of this section. The bond shall be in the amount required under §113.14 of this chapter. Within 90 days after such entry, or such additional period as the district director of Customs may allow for good cause shown, the importer or consignee shall deliver to the district director

the prescribed declaration. If the declaration is not delivered to thedistrict director of Customs for the port of entry of such vehicles or engines within 90 days of the date of entry or such additional period as may be allowed by the district director, for good cause shown, the importer or consignee shall deliver or cause to be delivered to the district director of Customs whose motor vehicle or motor vehicle engines which were released in accordance with this paragraph. In the event that any such motor vehicle or motor vehicle engine is not re-delivered within 5 days following the date specified in the preceding sentence, liquidated damages shall be assessed in the full amount of a bond given on Form 7551. When the transaction has been charged against a

bond on Form 7553, or 7595, liquidated damages shall be assessed in the amount that would have been demanded under the preceding sentence if the merchandise had been released under a bond given on Form 7551.

(d) Merchandise refused entry. If a motor vehicle or motor vehicle engine is denied entry under the provisions of paragraph (b) of this section, the district director of Customs shall refuse to release the merchandise for entry into the United States and shall give notice of such refusal to the importer.

(e) Disposition of merchandise refused entry into the United States; redelivered merchandise. Motor vehicles or motor vehicle engines which are denied entry under paragraph (b) of this section or which are redelivered

in accordance with paragraph (c) of this section and which are not exported under customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations: Provided, however, that any such disposition shall not result in an introduction into the United States of a motor vehicle or motor vehicle engine not covered by a certificate of conformity with Federal motor vehicle emission standards.

(f) Prohibited importations. The importation of motor vehicles and motor vehicle engines, otherwise than in accordance with the provisions of this section, is prohibited.

APPENDIX E3b:

40 C.F.R. §85.1504

Admission pending modification.

Any motor vehicle or motor vehicle engine offerred for importation or imported pursuant to 19 CFR 12.73(b)(5)(x) under a declaration that it is not covered by a certificate of conformity with Federal motor vehicle emission standards or family particulate emission limits, as defined in Part 86 may be conditionally admitted into the United States, but shall be refused final admission unless:

(a) Not later than 5 days following such conditional admission, the importer or consignee has submitted to the Administrator a written request that he be allowed to modify the vehicle or engine so that it will be in

conformity with applicable emission standards or family particulate emission limits, as defined in Part 86, which request shall contain the following:

(1) A statement, acceptable to the Administrator, that specifies the modification which are necessary to render the vehicle or engine in conformity with a test vehicle or engine for which a certificate of conformity has been issued; or, if the vehicle or engine cannot be modified to bring it within a class of vehicles or engines represented by a test vehicle or engine for which a certificate of conformity has been issued, the request shall state that the importer or consignee will demonstrate that the vehicle or engine is in conformity with applicable emission standards or family

particulate emission limits, as defined in Part 86 by testing the vehicle or engie or causing it to be tested in accordance with test procedures prescribed under section 206 of the Act in effect during (and applicable to) the model year of such vehicle.

(2) The date by which the modification will be accomplished;

(3) Identification of the place where the vehicle or engine will be stored pendig a determination of conformity under this paragraph; Provided, That such vehicle or engine shall not be stored on the premises of, or subject to access by or control of any dealer;

(4) An acknoledgement of responsibility for the custody of the vehicle or engine while the modifications are being made and while a determination of conformity is

pending;

(5) Authorization for representatives of the Environmental Protection Agency to inspect or test the vehicle or engine at any reasonable time for the purpose of making a determination of conformity; and

(b) The Administrator has issued a written determination stating that the vehicle or engine is in conformity with Federal motor vehicle emission standards or family particulate emission limits, as defined in Part 86.

APPENDIX E3c:

40 C.F.R. §85.1507

Storage and prohibited operation or sale of vehicles or engines conditionally admitted.

A motor vehicle or engine conditionally admitted pursuant to § 85.1503, § 85.1504, or § 85.1505 shall be stored and shall not be operated on the public highways or sold until such vehicle or engine has been granted final admission. Failure to comply with this provision shall constitute a violation of section 203(a)(1) of the Clean Air Act, as amended.

APPENDIX E3d:

40 C.F.R. §85.1508

Prohibited importation; penalties.

(a) The importation of any motor vehicle or motor vehicle engine otherwise than in accordance with any applicable provisions of this subpart and the bonding and entry regulations of the Bureau of Customs set forth in 19 CFR 12.73 is prohibited.

(b) Any vehicle or engine conditionally admitted pursuant to § 85.1503, § 85.1504, or § 85.1505 and not granted final admission within 90 days of such conditonal admission, or within such additional time as the Bureau of Customs may allow for good cause shown pursuant to 19 CFR 12.73(c), shall be deemed to be unlawfully imported into the United States in violation of section 203(a)(1) of the Clean Airt Act unless such vehicle or

engine shall have been delivered to the Bureau of Customs for export to other disposition under applicable Customs laws and regulations. Any importer or consignee who violates section 203(a)(1) of the Clean Air Act is subject to a civil penalty of not more than $10,000 for each violation. In addition to the penalty provided in the Clean Air Act, any importer or consignee who fails to deliver such vehicle or engine to the Bureau of Customs is liable for liquidated damages in the amount of bond required by applicable Customs laws and regulations.

APPENDIX E3e:

19 C.F.R. §12.80

Federal motor vehicle safety standards.

(a) Standards prescribed by the Department of Transportation. Motor vehicles and motor vehicle equipment manufactured on or after January 1, 1968, offered for sale, or introduction or delivery for introduction in interstate commerce, or importation into the United States are subject to Federal motor vehicle safety standards ("safety standards") prescribed by the Secretary of Transportation under s ction 103 and 119 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1392, 1407)("the Act"), and set forth in 49 CFR Part 571. A motor vehicle ("vehicle") or item of motor vehicle equipment ("equipment item"), manufactured on or after January 1, 1968, is not permitted

entry into the Customs territory of the United States unless (with certain exceptions set forth in paragraph (b) of this section) it is in conformity with applicable safety standards in effect at the time the vehicle or equipment item was manufactured.

(b) Requirements for entry and release. (1) Unless the requirements for filing is waived by the district director as provided for in paragraph (f) of this section, each vehicle or equipment item offered for introduction into the Customs territory of the United States shall be denied entry unless the importer or consignee files with the entry a declaration, in duplicate, which declares or affirms one of the following:

(i) The vehicle or equipment item was manufactured on a date when no applicable safety standards were in effect.

(ii) The vehicle or equipment item conforms to all applicable safety standards (or, the vehicle does not conform solely because readily attachable equipment items which will be attached to the vehicle before it is offered for sale to the first purchaser for purposes other than resale are not attached) and bears a certification label or tag to that effect permanently affixed by the original manufacturer to the vehicle or to the equipment item, or to the outside of the container in which the equipment item is delivered, in accordance with regulations issued by the Secretary of Transportation (49 CFR Parts 555, 567, 568 and 571) under section 114 of the Act (15 U.S.C. 1403)

(iii) The vehicle or equipment item was not manufactured in conformity all applicable safety standards, but it has been or will be brought into conformity.

Within 120 days after entry, or within a period not to exceed 180 days after entry, if additional time is granted by the Administrator, National Highway Traffic Safety Administration ("Administrator, NHTSA"), the importer or consignee will submit a true and complete statement to the Administrator, NHTSA, identifying the manufacturer, contractor, or other person who has brought the vehicle or equipment item into conformity, describing the exact nature and extent of the work performed, and certifying that the vehicle or equipment item has been brought into conformity, and that the vehicle or equipment item will not be sold or offered for sale until the Administrator, NHTSA, issues an approval letter to the district director stating that the conditions of the bond required by paragraph (e)(1) of this section have been satisfied.

(iv) The vehicle or equipment item is intended solely for export, and the vehicle or equipment item, and the outside of the container of the equipment item, if any, bears a label or tag to that effect.

(v) The importer or consignee is a nonresident of the United States, is importing the vehicle or equipment item primarily for personal use for a period not exceeding 1 year from the date of entry, will not sell it in the United States during the period, and has stated his passport number and country of issue, if he has a passport, on the declaration.

(vi) the importer or consignee is a member of the armed forces of a foreign country on assignment in the United States; a member of the Secretariat of a public international organization so designated under the International Organizations Immunities Act (22 U.S.C. 288), as listed

in 19 CFR 148.87, on assignment in the United States: or a member of the personnel of a foreign government on assignment in the United States who is within the class of persons for whom free entry of vehicles has been authorized by the Department of State; is importing the vehicle or equpment item for purposes other than resale; and a copy of his official orders, if any, is attached to the declaration (or, if a qualifying member of the personnel of a foreign government on assignment in the United States, the name of the embassy to which he is accredited is stated on the declaration).

(vii) The vehicle or equipment item is imported solely for the purpose of show, test, experiment, competiton (a vehicle the configuration of which at the time of entry is such that it cannot be licensed for use on the public roads is considered to be

imported for the purpose of competition), repair or alteration, and the statement required by 19 CFR 12.80(c)(2) or (c)(3) is attached to the declaration.

(ix) The vehicle is an "incomplete vehicle" as defined in 49 CFR Part 568.

(2) A vehicle imported solely for the purpose of test or experiment which is the subject of a declaration filed nder paragraph (b)(1)(vii) of this section may be licensed for use on the public roads is an integral part of the test or experiment. The vehicle may be licensed for use on the public roads for one or more further periods which, when added to the initial 1 year period, shall not exceed a total of 3 years, upon application to and approval by the Administrator, NHTSA.

(c) Declaration; contents. (1) Each declaration filed under paragraph (b)(1) of this section shall include the name and

address in the United States of the importer or consignee, the date and the entry number (if applicable), the make, model, and engine and body serial numbers, or other identification number (if vehicle), or a description of the item (if an equipment item), and shall be signed by the importer or consignee.

(2) Each declaration filed under paragraph (b)(1)(vii) of this section which related to a vehicle or equipment item reported for the purpose of show, competition, repair, or alteration shall have attached a statement fully describing the use to be made of the vehicle or equpment item and its ultimate disposition.

(3) Each declaration filed under paragraph (b)(1)(vii) of this section which relates to a vehicle imported solely for the purpose of test or experiment shall have attached a statement fully describing

the test or experiment, the estimated period of time necessary to use the vehicle on the public roads, and the disposition to be made of the vehicle after completion of the test or experiment.

(4) Any declaration filed under paragraph (b)(1) of this section may, if appropriate, relate to more than one vehicle or equipment item imported on the same entry.

(d) Declaration; disposition. The district director shall forward the original of each declaration submitted to him under paragraph (b)(1) of this section as soon as practicable to the Director, Office of Vehicle Safety Compliance, National Highway Traffic Safety Administration, Washington, D.C. 20590.

(e) Release under bond. (1) If a declaration is filed under paragraph (b)(1)(iii) of this section, the entry

shall be accepted only if the importer or consignee gives a bond on Customs Form 7551, 7553, or 7595 in the amount required by section 113.14 of this chapter. A condition of the bond shall be the production of an approval bond release) letter from the Administrator, NHTSA, stating that the vehicle or equipment item described in the declaration has been brought into conformity with all applicable safety standards. The bond release letter shall be issued upon approval by the Administrator, NHTSA, of the conformity statement submitted by the importer or consignee as provided for in paragraph (b)(1)(iii) of this section. The bond release letter shall be forwarded by the Administrator, NHTSA, to the district director with a copy to theimporter or consignee.

(2) If the bond release letter is not received by the district director within 180 days after entry, the district director shall issue a Notice of Redelivery, Customs Form 4647, requiring the redelivery of Customs custody of the vehicle or equipment itm. If the vehicle or equipment item is not redelivered to Customs custody or exported under Customs supervision within the period allowed by the district director in the Notice of Redelivery, liquidated damages shall be assessed in the full amount of a bond given on Customs Form 751. If the transaction has been charged against a bond given on Customs Form 7553 or 7595, liquidated damages shall be assessed in the amount that would have been assessed against a bond given on Customs Form 7551.

(f) Waiver of declaration requirements. The requirement that a declaration be filed under paragraph

(b)(1)(i), (b)(1)(ii), or (b)(1)(v) of this section as a condition to the introduction of a vehicle or equipment item into Customs territory of the United States may be waived by the district director for the United States, Canadian, or Mexican registered vehicles arriving via land borders.

(g) Vehicle or equipment item introduced by means of a fraudulent or false declaration. Any person who enters, introduces, attempts to enter or introduce, or aids or abets the entry, introduction, or attempted entry or introduction, of a vehicle or equipment item into the Customs territory of the United States by means of a fraudulent entry declaration, or by means of a false entry declaration made without reasonable cause to believe the truth of the declaration, may incur liabilites under section 592, Tariff Act of 1930, as amended

(19 U.S.C. 1592).

(h) Vehicle or equipment item denied entry. If a vehicle or equipment item is denied entry under the provisions of paragraph (b) of this section, the district director shall refuse to release the vehicle or equipment item for entry into the Customs territory of the United States and shall issue a notice of that refusal to the importer or consignee.

(i) Dispositon of vehicle or equipment item denied entry; redelivery. A vehicle or equipment item denied entry under paragraph (b) of this section, or redelivered to Customs custody under paragraph (e) of this section, which is not exported under Customs supervision within 90 days from the date of notice of denial of entry or date of redelivery, shall be disposed of under applicable Customs laws and regulations, except that disposition

shall not result in the introduction of the vehicle or equipment item into the Customs territory of the United States in violation of the Act.

Supreme Court, U.S.
FILED
JUL 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1950

In The

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR, DIVISION OF MOTOR VEHICLES,

Petitioners,

v.

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS SIMS AND FICA IN OPPOSITION

ROBERT P. SMITH, JR.
Counsel of Record

CECELIA C. SMITH
123 S. Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED:

I. The Eleventh Amendment question, on which this brief does not oppose review, is better stated in Respondents' Cross-Petition in No. 89-19, Question I, or it may be divided thus:

A. Does the Eleventh Amendment immunize a State from suit by its own citizens in Federal Court seeking only declaratory and injunctive relief against a statute violating on its face an express prohibition by Congress, "No state shall . . . "?

B. If a State's defense as "sovereign" is avoidable by suing a party surrogate, shall the State be deemed to have waived that defense, asserted for the first time on appeal, by objecting below to the joinder of a party surrogate, its Attorney General, and securing his dismissal from the case?

C. May a Court of Appeals, having induced the Attorney General as counsel for a State agency to assert that defense for the first time on its own appeal, remedy same by joining as party surrogate an officer of that agency?

II. When Congress has expressly preempted State regulation, is that preemption vitiated by the State's claimed purpose to be enforcing what it considers to be federal law?

III. When claimants are injured in fact by preempted State regulation, do they lack standing to sue if similar injury might have occurred under authentic Federal regulation?

IV. Must a preempted State statute be divided and some part saved when it does not appear the State would have enacted it, and preempting the whole avoids other constitutional issues?

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STATUTES INVOLVED

The Clean Air Act, 42 USC § 7543(a), provides:

> No state . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . subject to [the Clean Air Act]. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle . . . .

Florida Statute § 320.02(9), Fla. Stat. (1985), (1987), recodified as § 320.02(10) (1988 Supp.), provides:

> 320.02 Registration required; application for registration; forms. –
>
> . . .
>
> (9) Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. . . .

STATEMENT OF THE CASE

This Statement is made necessary by the inaccurate characterizations throughout the Petition of federal laws and regulations that Florida by its statute would arrogate to its own superintendence.

During the year 1985 when Sims and FICA sought and won relief in the U.S. district court, some 68,000

vehicles like Sims's old Mercedes-Benz, built to German standards and initially marketed abroad, were granted entry to the United States under joint regulation by Customs, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA).[1] Customs released those cars to importers under the usual form of bond, with added undertakings to conform the engine to EPA emission standards by adding a catalytic converter, burning only unleaded gasoline; and to install U.S.-approved headlights, seatbelt anchors, door beams, etc., as required by NHTSA in the Federal Motor Vehicle Safety Standards (FMVSS). 19 C.F.R. § 12.73(b)(5)(x); § 12.80(b)(1)(iii) (1985).

Thirty thousand imports in 1985, nearly half the total that year, were exempted from EPA compliance by the agency's "Five Year Personal Use Provision" allowing a "first-time individual importer," among them Respondent Sims, to import an older car for personal use without modification.[2] "A reduction in paperwork burden" was

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[1] EPA referred in 1987 to "the vastly increased volumes of nonconforming vehicles imported annually (from 1500 in 1980 to about 68,000 in 1985)." So speaking while this case was before the Eleventh Circuit, EPA promulgated an entirely new set of rules effective July 1, 1988: "Air Pollution Control; Importation of Nonconforming Motor Vehicles and Motor Vehicle Engines," 52 Fed. Reg. 36,136, 36,139 (Sept. 25, 1987), codified at 40 C.F.R. § 85.1501-.1515 (1988).

[2] In 1983 EPA recorded in *Federal Register* its policy since 1981 "exercis[ing] its enforcement discretion by not taking enforcement action . . . against an individual importing a vehicle at least five model years old, who has not imported a nonconforming vehicle since the effective date of the Clean Air Act of 1970. . . ." "Notice of Revised Administrative Procedures and Enforcement Policy," 48 Fed. Reg. 16,486 (Apr. 18, 1983).

an EPA goal in that policy, 48 Fed. Reg. 16,486 (1983), and EPA achieved it in 1985, the year when imports soared on new highs of Dollar purchasing power abroad. EPA simply checked the importer's name against a list of those who had already imported such a car, and exempted those who had not.[3] The compliance proofs sent to EPA were thus limited to those of new cars entering commercial markets. EPA was able to issue approvals even for nonexempt cars within three to six weeks (R4-42-88).

In May 1985 Respondent Sims bought and imported an older model Mercedes qualifying for her one-time EPA exemption. Automatically, EPA issued its exemption letter releasing EPA's interest in her bond. Ct. App. in banc op., 862 F.2d text at fn. 5, A15. Sims had her Safety Act devices installed at once, and mailed the proofs to NHTSA. Florida meanwhile refused Sims and others like her a tag and title.

NHTSA had no exemption policy, so had to deal with compliance proofs for all 68,000 imports that year. By mid-1985 NHTSA had a backlog of more than 14,000 sets of photographs and papers from conversion shops nationwide, proving safety devices newly installed in individual cars. Dist. Ct. Op., A222. NHTSA required three to four months, even up to a year, to examine all the paperwork and issue a form letter releasing NHTSA's interest in the importer's bond.

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[3] *Id.* at 16,487: "[A]ny individual who imports a vehicle that would qualify must . . . post a bond with Customs at the time of entry. . . . EPA will then determine if this policy applies to that individual and, if so, will ask Customs to release the EPA obligation on the bond."

The delay by NHTSA for several months was unimportant in NHTSA's regulatory scheme to any importer who had no wish to sell his or her car. (Indeed EPA already forbade its exempted importers from selling within two years, Ct. App. in banc op., 862 F.2d at 1453 fn. 5, A15). Neither the Safety Act nor NHTSA placed any restriction on tagging, titling and operating a car from the moment of importation – not even before the safety devices were installed, and the proofs sent to NHTSA. Ct. App. panel op., 832 F.2d text at 1563, fn. 7 at 1564, quoting D.O.T. statement to Congress (A122-23).

EPA's rule on the other hand prohibited driving before the car "has been granted final admission." 40 C.F.R. § 85.1507 (1985), (1987):

> A motor vehicle . . . conditionally admitted . . . shall be stored and shall not be operated on the public highways or sold until such vehicle . . . has been granted final admission. . . .

This "final admission" event became the focus of Florida's pose as enforcer of federal law and EPA policy. So far as EPA was concerned, its exemption of such cars as Sims's, or its approval of compliance by nonexempted cars, ended EPA's inquiry. That was its "final admission" ending EPA's § 85.1507 prohibition of driving. Both the agency's exemption letter and its modification-approval letter assume the car will then be registered anywhere but California, the only state not preempted by § 7543(a).[4]

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[4] PX 8B EPA's modification approval letter adds a "NOTE TO IMPORTER: This is an important document. Please keep a copy with the vehicle *registration* at all times" (e.a.). PX 8A

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But Florida, acting as if it were a territorial surrogate, interpreter and enforcer of federal law, denied these import cars tags and titles (refused only those, and granted any domestic smoking wreck a tag, title, and welcome to the highway, R4-42-18) saying EPA's "final admission" doesn't happen until NHTSA too, months later, writes a bond release letter. [The Department migrated far from its statutory text, confusing its own minions and the public, in search for *some* federal paper approximating "must be certified . . . to be in compliance with these federal standards," Fla. Stat. § 320.02(9).]

Florida declared as EPA policy, in other words, that after EPA exempted some 30,000 imports from emission standard compliance in 1985, and approved compliance by 38,000 more, EPA yet insisted that all 68,000 remain "stored" and not operated, 40 C.F.R. § 85.1507 (1985), until another agency that never prohibited driving at all took some distant action in its own regulatory realm.

Florida produced no evidence of this at trial, only hand-wringing lawyers who spoke ominously of federal violations as does their Petition, *passim*. Florida had no evidence that EPA enforced or intended to enforce any

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EPA's exemption letter advises, "We have been informed by the California Air Resources Board that a used vehicle . . . may not be *registered in California* unless it is first brought into conformity with California or Federal emission requirements" (e.a.). California alone, whose regulation predates the 1966 Clean Air Act, is excused by 42 USC § 7543(b) from preemption by § 7543(a). *Motor and Equip. Mfrs. Ass'n, Inc. v. Envtl. Protection Agency*, 627 F.2d 1095, 1101 fn. 1 (D.C. Cir. 1979).

such absurdity, and could not suggest why, if that *were* EPA policy, tens of thousands of owners like Sims across the Nation, their cars locked in garages awaiting inconsequential NHTSA paper, remained quiet and servile throughout the year, unknown to Congress, EPA and the public world.

The expert and anecdotal testimony in the district court trial was uncontradicted: EPA's § 85.1507 reference to "final admission" referred to its *own* act of approving catalytic converter proofs or declaring an equivalent exemption. EPA later gave further evidence of this in 1987 rulemaking, repeatedly using the term "final admission" in reference to EPA's own actions, none other.[5]

The U.S. district court wisely found it unnecessary to declare what was consistent and inconsistent with federal law in Florida's unauthorized pose as EPA's interpreter-enforcer. Rather the court held the Florida statute was expressly preempted by the Clean Air Act, preempted as well by the Safety Act's bestowal of enforcement powers

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[5] References in the 1987 rule to "final admission" include § 85.1502(8) *defining* a nonconforming car as one not "finally admitted into the United States under the provisions of" EPA's *own* rules; § 85.1503 granting or denying "final admission" *solely* in terms of conformity with EPA's *own* standards; § 85.1504(a) which conditions "final admission" exclusively on adequate report to "the [EPA] Administrator"; § 85.1505(a) which provides a car "may be finally admitted into the United States upon approval of the certificate holder's application *to the [EPA] Administrator*" (e.a.); § 85.1505(b) and (c) stating when "EPA approval for final admission . . . shall be presumed not to have been granted" and when "EPA approval for final admission . . . shall be presumed to have been granted"; and so on.

exclusively on NHTSA, and a plain violation of the dormant Commerce Clause as well, a rare unambiguous attempt by a State to regulate a sector of Foreign Commerce, Foreign Commerce *as such*, flowing through its ports. Dist.Ct. Op. App.D1, A227-28, as to the Clean Air Act (emphasis by the court):

> The state argues . . . that the challenged statute simply "insures that new cars coming on to Florida's highways comply with the Clean Air Act." . . . The state fails to recognize, however, that it is not its role to enforce such standards at the stage it seeks to do so. It does not matter if the state has enacted standards that are different or identical to those enacted by the federal government at this point. The intent of Congress is very clear and specific: Prior to the first sale [after importation], the states are preempted from enacting *any* regulatory or enforcement scheme either of their own *or to complement the federal scheme*, with specific regard to titling and registration. . . . Enforcement of the Clean Air Act before first sale is the sole and exclusive prerogative of the federal government. . . .

As to the Safety Act, *Id.* at A229, 235:

> The state argues again that it . . . is in fact merely requiring that the federal standards be met before a vehicle is allowed onto the state's highways.
>
> . . .
>
> This court is not swayed by such concern for the enforcement of federal law in this area. If one thing has become clear during the resolution of this case, it is that there is nothing in federal law to prohibit states from enacting enforcement schemes of their own to enforce the provisions of the Clean Air Act and the Motor Vehicle Safety Act *following the first sale of the vehicle*. . . . Indeed, Florida formerly had an automobile inspection program to do just that. . . .

As to the Commerce Clause, *Id.* at A236, A237-38:

> Even were the challenged Florida statute not preempted by federal law, it would have to fail as it is a burden on foreign commerce as prohibited by the Constitution under Article I, section 8, clause 3.
>
> . . .
>
> . . . The statute prevents the titling and registration of vehicles which in turn limits the marketability of the cars. To force an importer to use a different port of entry, for example Savannah, Georgia, or Mobile, Alabama, in order to receive registration and titles from the relevant state authorities without having to endure the trials and tribulations that Florida has erected in their path destroys the common market of commerce for the entire United States as established by the Constitution. It is precisely this type of state action that the Commerce Clause was designed to prevent; thus the statute is constitutionally infirm. As the state has presented no evidence that this law is necessary to serve some special local consideration, it cannot survive scrutiny under this section of the Constitution.

The Court of Appeals deliberating the Department's appeal raised new questions of mootness, standing and Eleventh Amendment – inciting the Eleventh Amendment plea by the Department which is the subject of Question I in this Petition, and Question I in Respondents' Cross-Petition, No. 89-19. The panel held on the merits, one judge dissenting, that Florida Statute § 320.02(9) was expressly preempted by the Clean Air Act, though *not* by the Safety Act,[6] but in any event was

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[6] The panel Safety Act holding was that Florida "imposes [no] additional requirements or burdens" not imposed by the

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entirely invalid for violation of the dormant Commerce Clause. *Sims v. Dept. of Highway Safety & Motor Vehicles*, 832 F.2d 1558 (11th Cir. 1987).

The Court of Appeals in banc held Florida was expressly preempted by the Clean Air Act but not by the Safety Act, and found it unnecessary to rule on the dormant Commerce Clause question.

ARGUMENT OPPOSING THE WRIT

Respondents do not oppose the Writ on Question I, the Eleventh Amendment. Their Cross-Petition in No. 89-19 urges the Court to take and decide that Question (more accurately stated in terms of the case), and to decide as well whether Sims and FICA will then have finally prevailed on a claim of right, privilege or immunity secured to them by the Clean Air Act, requiring a fee

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Safety Act, 832 F.2d at 1566, 1567. This unfortunate misconception is traceable within the panel opinions to the dissenter's extensive reliance upon an incompetent private document – "Automobile Importers Compliance Ass'n, *Handbook of Vehicle Importation*" – which lay in the record after the Department marked it for identification at trial but was unable to authenticate it as evidence. The district court excluded the monograph as unauthenticated hearsay after the identifying witness said the document was *wrong* in precisely the respects relied on by the dissenting judge, 832 F.2d at 1576 lt. col., saying the "final admission" referenced by EPA's rule "occurs after Customs receives bond release letters from the EPA and NHTSA and the duty is liquidated." After we called the error to the Court's attention, the illegitimate theory was for the most part excised from the in banc opinions.

award under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. Uniquely, the Clean Air Act not only preempts state motor emissions regulation to a certain point ("No state shall . . . ") but also grants a particular right or privilege to importers, or perhaps an immunity, which flows in consequence of that preemption: Congressionally-secured tags and titles notwithstanding any state's law, or views on federal law, relating to the control of emissions. 42 U.S.C. § 7543(a):

> No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle as condition precedent to the . . . titling . . . or registration of such motor vehicle. . . .

The right, privilege or immunity thereby secured in the importer, as Chief Justice Marshall once said, "convey[ed] the right to which the privilege [of importation] is attached, and in the exercise of which its whole value consists." *Gibbons v. Ogden, infra.*

II. Opposing the Writ on Question II, "The Clean Air Act does not preempt the State's traditional regulation of the highways."

Considering how Florida discriminates by § 320.02(9) discretely against a small sector of Foreign Commerce, as such, and freely tags, titles and opens its highways to any other car regardless of condition, this question is hardly pertinent.

The Petition asserts (p. 35) that Florida's statute "does not create or enforce air emission standards," nor, presumably, safety standards. Florida proposes rather that "traditional regulation of the highways" includes its

authoritative interpretation and enforcement of laws enacted by Congress regulating Commerce with Foreign Nations. "Any vehicle not in compliance and inside the customs territory of the United States is here illegally," Florida says Petition p. 38, also pp. 31, 37, 39, 42. Florida therefore is not preempted by the express language of the Clean Air Act: "No state shall . . . "

Florida confuses its power as a state with regard to safety and emissions in cars on its highways – a power Florida chooses not to exercise – with the power Congress has as regards some of those cars because to a point specified by Congress they are instruments of Foreign Commerce that Congress has chosen to protect under its own exclusive regulation.

The only possible reason to grant the Writ on such a Question as the State poses would be to seize a rare opportunity to reaffirm the federalist principles that enlivened Chief Justice Marshall's opinion for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

With clarity rarely achieved (or needed) since, Marshall distinguished in "terms and nature" Florida's power from that of Congress and its agents such as EPA. 22 U.S. at 197:

> The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition [by New York] now under consideration applies . . .

At 199, 200:

> . . . In imposing taxes for state purposes, they [the states] are not doing what Congress is empowered to do. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations . . . it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. . . .

The matter in issue was (every law student learns) New York's asserted power upon its waterways to supervise, to permit or deter, boats employed by Gibbons "in carrying on the coasting trade, under the act of Congress." 22 U.S. at 2. The analogy to the present case could not be more clearly stated than by Chief Justice Marshall, 22 U.S. at 212-13:

> It will at once occur, that, when a legislature [Congress] attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the right must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say . . . that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey [or, Sims and FICA would add, from Germany], to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; *but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state.* . . .
>
> This section [of the Act of Congress] seems to the court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. Those privileges cannot be separated from the trade, and

> cannot be enjoyed, unless the trade may be prosecuted. *The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which the whole value consists.* (Emph. added.)

The only significant differences between New York there and Florida, here, are that Florida claims not to deter this Commerce on its own authority, but on the very authority of the United States; and whereas New York offended only the dormant Commerce Clause, Florida in order to "shut her up in her own port" refuses importers the very license that Congress prohibits the states to refuse. In every proper sense, then, "the privilege" of importing goods in Foreign Commerce, granted Sims and others by the United States, "is an idle, empty form, conveying nothing," for want of "the right to which the privilege is attached, and in the exercise of which the whole value consists."

III. Opposing the Writ on Question III, Asserted EPA restrictions as dissolving Respondents' Standing.

This Question is the same as Question II, garbed in other doctrine:

Very well, the argument goes, the Constitution forbids Florida to deny tags and titles to cars imported under auspices of a preemptive Act of Congress and the supervision of federal regulators; but the complaint of Sims and FICA does not describe an Article III "case or controversy" because, until EPA's prohibition of driving is lifted by NHTSA's bond release letter, the real cause of plaintiffs' problem is not Florida's meddling but EPA's prohibition.

Respondents' "standing" was questioned in these terms for the first time by the Court of Appeals panel four months after oral argument. The Clerk's letter dated February 18, 1987 (raising "mootness" and Eleventh Amendment, as well) stated in relevant part:

> The court requests supplemental briefing on the following issues: (1) what are appellees' obligations under the Clean Air Act and . . . Safety Act . . . ; (2) do either, or both, of these statutes or the regulations preclude an importer of a gray market automobile from titling, registering, or driving that automobile in Florida prior to receipt of notice of compliance with such laws from the United States Environmental Protection Agency, the United States Department of Transportation, and the United States Customs Service; (3) if the answer to (2) is yes, what injury, in an article III standing sense, could appellees have sustained as a result of Florida's refusal to title and register gray market automobiles prior to the issuance of the above notices of compliance . . . ?

Though the panel majority eventually found Respondents had standing, its disposition of the issue was affected by a most unfortunate disregard for the uncontradicted evidence at trial. (Perhaps the court felt it was not bound by the evidence and the usual presumptions, since the "standing" issue it raised on appeal wasn't called that below.) More unfortunate still, the panel's "standing" discussion was dominated by reliance on an incompetent third-party hearsay document someone found in the record but not in evidence. The district judge excluded it from evidence after the State's identifying witness said the document was in error on the only point that mattered: EPA's "final admission" did *not*, as the paper said, depend on NHTSA's bond release letter (R4-42-128, 133). Details *supra* p. 8 fn. 6.

The panel's discredited "standing" analysis was abandoned by the court in banc, as Petitioner acknowledges, Petition p. 49 fn. 11, and placed on another ground entirely. The "standing" issue posed by Petitioners as Question III was not, therefore, addressed by the Court of Appeals in banc.

Its factual flaws aside, "standing" as conceived by Petitioners would nullify the right of United States citizens to insist that the United States government, rather than a hostile State, exercise the powers of the United States. The theory suggested is that it does not matter if Florida arrogates EPA's power to itself, EPA would have exercised that power the same way (if, EPA being absent, Florida can so persuade some federal judges). Therefore no injury was caused plaintiffs by Florida, and there is no "case or controversy."

That reasoning would disown the federal judiciary of jurisdiction in any case where a state's persuasiveness was equal to its effrontery posing as local arbiter of federal law and policy. "In effect," Justice Brennan said in circumstances far less threatening to federalism, plaintiffs "will not be permitted to prove what they have alleged . . . because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit." *Warth v. Seldin*, 422 U.S. 490, 523, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (dissenting op.).

Question III is unworthy of review because its factual premise is false, because it was not addressed by the in banc Eleventh Circuit, and because it is neither colorable nor important as a matter of law.

IV. Opposing the Writ on Question IV, Whether Florida's role as Safety Act enforcer must be saved.

While we cannot conceive how this Florida statute can survive Foreign Commerce Clause scrutiny, and both the district court (A236-38) and the Eleventh Circuit panel (832 F.2d at 1568-69, A143-48) agreed it does not, the in banc court avoided that decision, 862 F.2d at 1458, fn. 13, by declaring § 320.02(9) entirely invalidated by the Clean Air Act.

There is a certain propriety in this. There is no reason to think the Florida Legislature would have enacted the statute had it not thought EPA's prohibition of driving pending "final admission", 40 C.F.R. § 85.1507 (1985), an opportunity for State enforcement. NHTSA and the Safety Act didn't offer that inducement, indeed didn't restrict driving at all. What then remains of Florida Statute § 320.02(9) for Florida to enforce, with its reliance on purported EPA restrictions now preempted?

The Eleventh Circuit majority plainly felt it prudent to declare the whole statute invalid and remit the question to the Florida Legislature, rather than to assume unnecessarily that that body would wish its statute to stand, shorn of pretense of enforcing an EPA prohibition. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 56 S.Ct. 855, 80 L.Ed 1160 (1936). The Court also avoided a direct construction of the dormant Foreign Commerce Clause by placing its decision on grounds of the express preemption by Congress.

Question IV is not worthy of review.

CONCLUSION

The Writ should be denied on Questions II, III and IV. They are distracting, not substantial. Should the Court grant review on Question I, and on Questions I and II of the Cross-Petition, the Court will have every opportunity to speak as necessary to the principles of federalism that control Questions II, III and IV as presented by Petitioners.

Respectfully submitted

ROBERT P. SMITH, JR.
Counsel of Record

CECELIA C. SMITH
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

For Respondents

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